Supreme Court, U.S.
FILED
JAN 5 1994
OFFICE OF THE CLERK

NO. 93-1125

In the
Supreme Court of the United States

OCTOBER TERM, 1993

O. WILLIAM REEDER, JR.
Petitioner

versus

THE SUCCESSION OF MICHAEL B. PALMER, LYNN PAUL MARTIN, INDIVIDUALLY AND D/B/A LPM ENTERPRISES AND BANK OF LAPLACE
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

BRUCE A. NORTH
Counsel of Record
Louisiana Bar No. 10072
1100 Fourth Street
Gretna, Louisiana 70053
Phone: (504) 367-9001
Attorney for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

60 pp

QUESTION PRESENTED

1. When a federal district court dismisses a federal claim prior to trial pursuant to Rule 12(b)(6) and/or Rule 56 of the Federal Rules of Civil Procedure, should the district court adjudicate remaining pendent state claims, absent extraordinary circumstances.

2. Does a judgment dismissing a federal claim prior to trial as aforesaid preclude a second action on purely state claims that were omitted from the federal proceeding but grew out of the same nucleus of operative facts?

PARTIES TO THE PROCEEDINGS

O. WILLIAM REEDER, JR.

SUCCESSION OF MICHAEL B. PALMER

LYNN PAUL MARTIN

TABLE OF CONTENTS

Page No.

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT

I. THIS CASE IS BASED UPON A MANIFESTLY ERRONEOUS INTERPRETATION OF FEDERAL LAW DETERMINING THE EFFECTS UNDER THE RULES OF RES JUDICATA OF A JUDGMENT OF A FEDERAL COURT. IT REPRESENTS A DRAMATIC DEPARTURE FROM THE TRADITIONAL VIEW THAT FEDERAL COURTS ARE COURTS OF LIMITED JURISDICTION BY CONCLUDING THAT THERE NOW EXISTS A COUNTERVAILING

TABLE OF CONTENTS (continued)

Page No.

POLICY FAVORING THE ADJUDICATION OF PENDENT STATE CLAIMS, NOTWITHSTANDING THE DISMISSAL OF THE FEDERAL CLAIM, WHICH FORMS THE BASIS OF JURISDICTION, PRIOR TO THE TRIAL. IT CONFUSES THE STANDARDS WHICH GOVERN DEFICIENT FEDERAL QUESTION CLAIMS WHICH ARE PENDENT TO FEDERAL CLAIMS WITHIN THE GENERAL JURISDICTION OF THE FEDERAL COURT WITH THOSE STANDARDS APPLICABLE TO PURELY STATE CLAIMS PENDENT TO JURISDICTIONALLY ACCEPTABLE FEDERAL CLAIMS. FINALLY, IT CHANGES THE RULES GOVERNING THE EXERCISE OF PENDENT JURISDICTION OVER STATE CLAIMS FOLLOWING DISMISSAL OF THE FEDERAL CLAIMS PRIOR TO TRIAL BY HOLDING THAT ONLY IN EXCEPTIONAL CASES SHOULD THE FEDERAL COURT DECLINE TO ADJUDICATE THESE CLAIMS. 4

II. THE SUPREME COURT OF LOUISIANA HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A MANNER WHICH CONFLICTS WITH PRECEDENTS OF THIS COURT, WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND WITH OTHER UNITED STATES COURTS OF APPEAL. 11

TABLE OF CONTENTS (continued)

Page No.

CONCLUSION 19

APPENDIX

APPENDIX A A-1

APPENDIX B A-3

APPENDIX C A-20

APPENDIX D A-37

TABLE OF AUTHORITIES

CASES **PAGE**

Baltimore Orioles v. Major League Baseball Players, 805 F.2d 663, 682 (7th Cir. 1986) 15

Puckett v. City of Emmett, 747 P.2d 48 (Idaho 1987) . 17

Rapid Transit Advocates v. Southern California Rapid Transit District, 752 F.2d 373, 379 (9th Cir. 1985) 15

Tully v. Mott Supermarkets, 540 F.2d 187 (3rd Cir. 1976) 12,14

United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) . . . . . *passim*

WHAM-O-MFG v. Paradise MFG, 327 F.2d 748 (9th Cir. 1964) 7,18

Reeder v. Succession of Michel D. Palmer, 604 So.2d 1070 (5th Cir. 1992) 3

Hagans v. Lavine, 415 U.S. 528 (1974) 4,8,9

Rosada v. Wyman, 397 U.S. 403 (1970) 9,11

W. R. Grace v. Continental Casualty Co., Inc., 896 F.2d 865, (5th Cir. 1990) 10,17

TABLE OF AUTHORITIES (continued)

CASES **PAGE**

Carneqie - Mellon Univ. v. Cohill, 484 U.S. 350 (1988) 10,11

Federman v. Empire Fire and Marine Insurance Company, 597 F.2d 798 (2nd Cir. 1979) 11,14

Rosario v. American Export-Isbrandsten Lines, Inc., 531 F.2d 1227 (3rd Cir. 1976) 11,14

Propps v. Weihe, Black and Jeffries, 582 F.2d 1354 (4th Cir. 1978) 15

Tinker v. DeMaria Porsche-Audi, Inc., 632 F.2d 520 (5th Cir. 1980) 15

McDonald v. Oliver, 642 F.2d 169 (5th Cir. 1981) 15

Putnam v. Williams, 652 F.2d 497 (5th Cir. 1981) 15

McNeal v. Paine, Webber, Jackson & Curtis, Inc., 249 Ga. 662, 293 S.E. 2d 331 (1982) 16

Anderson v. Phoenix Investment Counsel of Boston, Inc., 387 Mass. 444, 440 N.E.2d 1164 (1982) 16

Jeanes v. Henderson, 688 S.W.2d 100 (Tex.) (1985) 16

TABLE OF AUTHORITIES (continued)

CASES **PAGE**

Rennie v. Freeway Transport, 294 Or. 319, 656 P. 2d 919 (1982) 16

Joiner v. Diamond M. Drilling Co., 677 F.2d 1035,1042 (5th Cir. 1982) 17

STATUTES

28 U.S.C. 1257 2

OTHER AUTHORITIES

Federal Rules of Civil Procedure, Rule 12(b) (6) 12

Federal Rules of Civil Procedure, Rule 56 12

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

O. WILLIAM REEDER, JR.
Petitioner

versus

THE SUCCESSION OF MICHAEL B. PALMER, LYNN PAUL MARTIN, INDIVIDUALLY AND D/B/A LPM ENTERPRISES AND BANK OF LAPLACE
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

Petitioner, O. WILLIAM REEDER, JR., requests that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Louisiana entered on September 3, 1993.

OPINIONS BELOW

There was no formal opinion of the district court. A copy of the judgment is reproduced in Appendix A of this petition.

The opinion of the Court of Appeal, Fifth Circuit, State of Louisiana, was not designated for publication and is reproduced in Appendix B of this petition, together with the denial of rehearing.

The opinion of the Supreme Court of Louisiana, as yet unreported, is reproduced in Appendix C of this petition. The denial of the Application for Rehearing is reproduced in Appendix D of this petition.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Louisiana was rendered on September 3, 1993. A timely Application for Rehearing was denied on October 7, 1993.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257. The federal question was raised by way of Exception of Res Judicata in the state district court, was considered by the Court of Appeal 5th Cir. State of Louisiana (Appendix B at 4-6), and was expressly passed on by the Supreme Court of Louisiana (Appendix C).

STATUTE INVOLVED

This case involves the application of Res Judicata which is a judicially created doctrine.

STATEMENT OF THE CASE

The federal question posed here requires an examination of the effect of federal pendent jurisdiction upon the doctrine of res judicata as it applies to a judgment of a

federal court imposed as a bar to a subsequent state action. Petitioner originally sued for damages in federal district court under federal securities statutes alleging losses as a result of a Ponzi or pyramid scheme perpetrated by defendants. The complaint was met with Motions to Dismiss pursuant to Rules 12(b) (6) and 56 of the Federal Rules of Civil Procedure. The federal district court granted the motions and dismissed the complaint, including a pendent state securities law claim, on the ground that the post-dated checks issued to petitioner in return for his investment in the bogus air travel business did not qualify as "securities" or "investment contracts" under federal or state securities laws. *Reeder v. Succession of Palmer,* 917 F.2d 560 (5th Cir. 1990).

Prior to the decision of the federal appellate court, petitioner filed suit in state court alleging violation of state securities laws, breach of contract, breach of fiduciary duty, tort and unfair trade practices, all arising out of the same Ponzi scheme described in the federal court proceeding. When the federal appellate court affirmed, petitioner amended his petition to eliminate the state securities law claims. The state trial court, without stated reasons, sustained defendant's exceptions of res judicata and no cause of action. The state court of appeal affirmed in part and reversed in part, holding that the federal judgment dismissing the state securities law claim operated as a final adjudication on the merits of this claim for res judicata purposes. "However, this does not apply to Reeder's additional claims against Palmer *personally* under the Louisiana Unfair Trade Practices Act and those sounding in tort and in contract, which were *not included* in the federal petition and which are discussed hereinafter." *Reeder v.*

Succession of Michael B. Palmer, 604 So.2d 1070 (5th Cir. 1992). (Appendix B at 7). The appellate court went on to hold that the tort claims had prescribed, the unfair trade practice claim was perempted, and since the contract claim was not barred by res judicata, the petitioner should be allowed an opportunity to restate that claim.

The Supreme Court of Louisiana granted writ applications filed by both sides. On review, the court held that the federal court had pendent jurisdiction over all of petitioner's state law claims because they arose out of the same transaction and that petitioner was obligated to assert all of those claims in the federal proceeding. Further, that the res judicata effect of the federal court judgment precluded the omitted state law claims because it was not clear that the federal district court would have declined to exercise pendent jurisdiction over them. The court noted the rule enunciated in *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966) that "if the federal claims are dismissed before trial...the state claims should be dismissed as well," but concluded that the rule was not a mandatory rule to be applied inflexibly. Citing *Hagans v. Lavine,* 415 U.S. 528 (1974), the Louisiana Supreme Court incorrectly found a new "countervailing policy in favor of hearing pendent state claims," which would require that a federal court adjudicate pendent state claims where the federal claim is dismissed before trial, unless there are "exceptional" circumstances. Finding that this was not an exceptional case, the court dismissed the entire matter. (Appendix C at 9-11).

REASONS FOR GRANTING THE WRIT

I. THIS CASE IS BASED UPON A MANIFESTLY

ERRONEOUS INTERPRETATION OF FEDERAL LAW DETERMINING THE EFFECTS UNDER THE RULES OF RES JUDICATA OF A JUDGMENT OF A FEDERAL COURT. IT REPRESENTS A DRAMATIC DEPARTURE FROM THE TRADITIONAL VIEW THAT FEDERAL COURTS ARE COURTS OF LIMITED JURISDICTION BY CONCLUDING THAT THERE NOW EXISTS A COUNTERVAILING POLICY FAVORING THE ADJUDICATION OF PENDENT STATE CLAIMS, NOTWITHSTANDING THE DISMISSAL OF THE FEDERAL CLAIM, WHICH FORMS THE BASIS OF JURISDICTION, PRIOR TO THE TRIAL. IT CONFUSES THE STANDARDS WHICH GOVERN THE ADJUDICATION OF DEFICIENT FEDERAL QUESTION CLAIMS WHICH ARE PENDENT TO FEDERAL CLAIMS WITHIN THE GENERAL JURISDICTION OF THE FEDERAL COURT WITH THOSE STANDARDS APPLICABLE TO THE ADJUDICATION OF PURELY STATE CLAIMS PENDENT TO JURISDICTIONALLY ACCEPTABLE FEDERAL CLAIMS. FINALLY, IT CHANGES THE RULES GOVERNING THE EXERCISE OF PENDENT JURISDICTION OVER STATE CLAIMS FOLLOWING DISMISSAL OF THE FEDERAL CLAIMS PRIOR TO TRIAL BY HOLDING THAT ONLY IN EXCEPTIONAL CASES SHOULD THE FEDERAL COURT DECLINE TO ADJUDICATE THESE CLAIMS.

The leading case in this area is *United Mine Workers*

of America v. Gibbs, 383 U.S. 715 (1966). In *Gibbs* the court reviewed a federal district court decision which allowed a federal question claim and a state claim based on the common law of Tennessee to proceed to a jury verdict and judgment. The court found that the district court did not exceed its discretion in carrying the state claim forward.

The *Gibbs* court analyzed pendent jurisdiction in terms of judicial power and judicial discretion. Federal courts, as courts of limited jurisdiction, have the power to hear a state claim when that claim and the federal one derive from a common nucleus of operative fact:

> "...[I]f,... a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then ... there is power in federal courts to hear the whole." *Id.* at 725.

However, the court viewed the exercise of that power as a matter of judicial discretion, not of plaintiff's right. It delineated guidelines for the application of that discretion as follows:

> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of the judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. [citation omitted]. Needless decisions of state law should be

> avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. **Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.** *WHAM-O-MFG v. Paradise MFG,* 327 F.2d 748, 9th Cir. 1964). Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. *Id.* at 1139 (emphasis added).

Following the U.S. Supreme Court's adoption of the *WHAM-O* court's position in *Gibbs,* federal courts have consistently followed the rule that where a federal claim is dismissed in advance of trial any pendent state claims should be dismissed as well.

In the instant case we are dealing with state claims which were not asserted in the federal proceeding. These claims include breach of contract, breach of fiduciary duty, tort and unfair trade practice. The Supreme Court of Louisiana held that they should have been urged and, had they been, it cannot be said that having dismissed the federal securities claim prior to trial, the federal court would *clearly* have declined to decide the purely state claims anyway. This is contrary to *Gibbs* and represents what would be an unwarranted extension of federal jurisdiction. Clearly, these pendent state claims would and should have been dismissed.

The Supreme Court of Louisiana based its analysis on the case of *Hagans v. Lavine,* 415 U.S. 528 (1974) and what it perceived to be a new and countervailing policy in favor of hearing pendent state claims notwithstanding the dismissal of the principal federal claims. This conclusion is unusual in view of the fact that there were no pendent state claims at issue in *Hagans*. This was the factor that the *Hagan's* court used to distinguish *Gibbs*:

> "But *Gibbs* was oriented to state law claims pendent to federal claims conferring jurisdiction on the District Court. Pendent jurisdiction over state claims was described as a doctrine of discretion not to be routinely exercised without considering the advantages of judicial economy, convenience, and fairness to litigants. For, "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Id.* at 726.

The Court further commented:

> "...[T]he rationale of *Gibbs* centers upon considerations of comity and the desirability of having a reliable and final determination of the state claim by state courts having more familiarity with the controlling principles and the authority to render a final judgment. ***These considerations favoring state adjudication are wholly irrelevant where the pendent claim is federal but is itself beyond the jurisdiction of the district court for failure to satisfy the amount in controversy.*** In

> such cases, the federal court's rendition of federal law will be at least as sure-footed and lasting as any judgment from the state courts." (emphasis added)

The result in *Hagans* is logical and wholly consistent with *Gibbs*. The argument for exercise of pendent jurisdiction over a federal claim is "particularly strong" since the federal court's application of federal law will be at least as "sure-footed" as any judgment of a state court. Obviously, these same considerations are totally inappropriate if a federal court is dealing with pendent state claims as are present in the instant case. The exercise of pendent jurisdiction in those circumstances is appropriate *only* under "extraordinary circumstances."

The court further relied upon the case of *Rosada v. Wyman*, 397 U.S. 403 (1970) for the proposition that *Gibbs* does not establish an inflexible rule that *pendent state claim* must be automatically dismissed if the federal claim is dismissed before trial. This analysis is flawed by the fact that, as in *Hagans*, the Court in *Rosada* was dealing with *a pendent federal claim* which, of itself, could not pass jurisdictional muster. This clearly changes the rules as to whether the federal court should or should not exercise its pendent jurisdiction. If the pendent claim is "federal" then "the argument for exercise of pendent jurisdicition is particularly strong." *Rosada, id.* at 404 (citing *Gibbs*). On the contrary, if the pendent claim is "state" then exercise of pendent jurisdiciton should only occur under "extraordinary circumstances." In a concurring opinion in *Rosada*, the significance of this distinction was explained:

> The main distinction between this case and

> Gibbs is that the pendent claim here was one of federal rather than state law. And it is clear from the opinion in Gibbs that the factor of federal-state comity is highly relevant in deciding whether or not the exercise of pendent jurisdiction is proper. Thus the court stated: "There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong." *Id.*, at 727 16 L. Ed. 2d at 228. Since the claim involved here is one of federal law, the reasons for the exercise of pendent jurisdiciton are especially weighty, and exceptional circumstances should be required to prevent the exercise. *Id.* at 425-426.

"Extraordinary circumstances" have been generally found to exist in cases where dismissal without prejudice would cause "undue prejudice" to the parties. *W. R. Grace v. Continental Casualty Co., Inc.*, 896 F. 2d 865, 872 (5th Cir. 1990). There can be no showing of undue prejudice in this case. There has been no discovery and there has been no trial on the merits.

Additionally, the Louisiana Supreme Court's reliance on *Carnegie - Mellon Univ. v. Cohill*, 484 U.S. 350 (1988) is misplaced. That case involved pendent state claims and favors petitioner's position. "When the single federal law claim was eliminated at an early stage of the litigation the district court had a powerful reason not to continue to exercise jurisdiction" ... over the pendent state claims. *Id.* at 351. Following *Gibbs* the court refused to exercise pendent jurisdiction. The only question then, since the matter was before the federal court by way of removal,

was whether to remand or dismiss. In discussing its options the court noted that the *Gibbs* rule was not "inflexible" in all cases, citing *Rosada v. Wyman. Carnegie - Mellon, id.* at 351, n.7. Of course, *Rosada* dealt with the pendent federal claim exception to *Gibbs.*

The *Gibbs* rule requiring dismissal of pendent state claims where federal jurisdiction is lost is so strongly maintained that it has produced some seemingly unusual results. These cases involve pendent state claims which were adjudicated by the federal district court *after* the main federal demand was eliminated *prior to trial:*

> *Federman v. Empire Fire and Marine Insurance Company,* 597 F.2d 798, 811 (2nd Cir. 1979); (District court retained and adjudicated state law claims; court of appeals reversed, holding that it was error to retain and adjudicate ancillary claim after settlement of main action.)
>
> *Rosario v. American Export-Isbrandsten Lines, Inc.,* 531 F.2d 1227, 1233 (3rd Cir. 1976) (District court retained and adjudicated state law claim; court of appeals reversed, noting that it was error to retain ancillary claim after settlement of main admiralty action.)

These cases further demonstrate the severe limitations placed upon the exercise of pendent jurisdiction over state claims where the federal claim is disposed of prior to trial.

II. THE LOUISIANA SUPREME COURT HAS DECIDED AN IMPORTANT FEDERAL QUES-

TION IN A MANNER WHICH CONFLICTS WITH PRECEDENTS OF THIS COURT, WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND WITH OTHER UNITED STATES COURTS OF APPEAL.

Gibbs stands for the proposition that the power of the federal court to exercise pendent jurisdiction over purely state claims *requires* a federal claim of sufficient substance to confer that jurisdiction. If that federal claim is subject to dismissal under F.R.Civ.P. 12(b) (6) or summary judgment under F.R.Civ.P. 56 then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances. *Tully v. Mott Supermarkets,* 540 F.2d 187 (3d Cir. 1976).

In *Tully v. Mott Supermarkets,* 540 F.2d 187 (3rd Cir. 1976) the plaintiff filed a federal complaint alleging violation of various federal securities laws. Additionally, plaintiff charged state law breach of fiduciary duty, fraud, interference with contractual relations and violations of state securities laws. The trial court decided for the plaintiff. On appeal, the Court held that the plaintiff lacked standing to sue for violations of the federal securities laws and reversed the judgment on the federal question claim. The Court then considered whether the district court should or could, have entertained the state claims under the doctrine of pendent jurisdiction. Relying on *Gibbs* the Court noted that the power of the Court to exercise pendent jurisdiction requires at a minimum a federal claim of sufficient substance to confer that jurisdiction:

If it appears that the federal claim is subject to

dismissal under F.R.Civ.P 12(b) (6) or could be disposed of on a motion for summary judgment under F.R.Civ.P. 56, then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances. *Kavit v. A. L. Stamm & Co.*, 491 F.2d 1176 (2d Cir. 1974). As the Second circuit noted in *Kavit*, "this is essential to avoid a result where, as has been happily said, 'the dog would be wagged by his tail.' Hart & Wechsler, The Federal Courts and the Federal System 925 (2d ed. 1973)."

Applying these principles to the instant case, we believe that the pendent state claims should have been dismissed together with the federal claims. Plaintiffs' lack of standing to sue under Rule 10b-5 was a threshold bar which precluded them from stating in their complaint a cognizable claim for relief under the federal securities laws. As a consequence, their complaint could not have withstood a motion to dismiss for failure to state a claim under F.R.Civ.P. 12(b) (6). That this defense was raised in defendants' answer rather than by motion is of no moment. Under either alternative the absence of a substantial federal claim for relief should have been apparent on the basis of the pleadings at an early stage in the proceedings. Since there was no substantial federal claim to which the state claims could be appended, the primary justification for the exercise of pendent jurisdiction was absent. Accordingly, the state claims should have been dismissed. See *Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 395 F.2d 420 (3d Cir. 1968); *Elberti v. Kunsman*, 376 F.2d 567 (3d Cir. 1967) (per curiam).*Id.* at 196.

The Court further noted that there were no "exceptional circumstances" which might remove the case from the general principles requiring dismissal:

> Notwithstanding the already substantial time devoted to the case and the expense incurred by the parties, we do not believe that the hallmark considerations of "judicial economy, convenience, and fairness to litigants" dictate that the pendent claims be entertained. It is indeed unfortunate that the case has progressed to the appellate level following a trial by the district court when it should have been dismissed on the pleadings for lack of standing.*Id.* at 196.

The parallel between *Tully* and the instant case is obvious. However, here the threshold question of standing to sue under the federal securities laws, i.e., the existence vel non of a "security," was decided in advance of trial on a motion to dismiss. Under the circumstances, the federal district court would not and could not have retained pendent jurisdiction over the state claims at issue herein.

This rule has been consistently followed:

1. *Federman v. Empire Fire and Marine Insurance Company,* 597 F.2d 798, 811 (2nd Cir. 1979) (Settlement of main federal claim prior to trial necessitates dismissal of state law claims.)

2. *Rosario v. American Export-Isbrandsten Lines, Inc.,* 531 F.2d 1227, 1233 n.17 (3rd Cir. 1976) (Where seaman's claim against shipowner is settled prior to trial, ancillary state-law claim against hospital should also be dismissed.)

3. *Propps v. Weihe, Black and Jeffries*, 582 F.2d 1354, 1356 (4th Cir. 1978) (District Court acted properly in dismissing ancillary third-party claims when main federal action was settled prior to trial.)

4. *Tinker v. DeMaria Porsche-Audi, Inc.*, 632 F.2d 520, 523 (5th Cir. 1980) ("[I]f the federal claims are dismissed before trial... the state claim should be dismissed as well.")

5. *McDonald v. Oliver*, 642 F.2d 169, 172 (5th Cir. 1981) ("The district court lost its ancillary jurisdiction when the underlying lawsuit was dismissed.")

6. *Putnam v. Williams*, 652 F.2d 497, 502 (5th Cir. 1981) ("The preferred practice, when no extensive proceedings on the ancillary claim have begun in federal court, is to dismiss [the state-law claim] so that the case may be brought in state court where it belongs.")

7. *Baltimore Orioles v. Major League Baseball Players*, 805 F.2d 663, 682 (7th Cir. 1986) ("[W]hen federal claims are disposed of before trial, the state claims should be dismissed without prejudice, almost as a matter of course.")

8. *Rapid Transit Advocates v. Southern California Rapid Transit District*, 752 F.2d 373, 379 (9th Cir. 1985) ("Since no federal claim remained, the district court properly refused to amend the complaint to allege additional claims under state law.")

Each one of these cases was decided before trial. Each one, in reliance on *Gibbs*, resulted in either the

dismissal of the pendent state claims or the refusal to permit amendment to add state claims. Each one held that the dismissed or omitted state claims would not be precluded in a subsequent proceeding. *Gibbs* requires the same result in the instant case.

On the other hand, the cases cited by the Louisiana Supreme Court in the concluding paragraph of its opinion are all distinguishable from the instant case. Each and every one was decided by a trial on the merits.

1. *McNeal v. Paine, Webber, Jackson & Curtis, Inc., (249 Ga. 662, 293 S.E.2d 331 (1982))* ("The parties stipulated at trial that proof of churning would render Paine, Webber liable... Paine, Webber won a favorable verdict.") *Id.* at 331.

2. *Anderson v. Phoenix Investment Counsel of Boston, Inc.*, 387 Mass. 444, 440 N.E. 2d 1164 (1982) (After a jury waived trial the federal judge found against the plaintiff on every count.") *Id.* at 1166, n.3.

3. *Jeanes v. Henderson*, 688 S.W.2d 100 (Tex.) (1985) ("That Court directed verdicts against Jeanes on the alleged securities law violations as well as the first four of Jeanes state related claims. Only the breach of contract and warranty claims survived the directed verdicts and that claim was decided against Jeanes based on jury findings.") *Id.* at 103.

4. *Rennie v. Freeway Transport*, 294 Or. 319, 656 P. 2d 919 (1982)) ("The jury returned a general verdict for defendants.") *Id.* at 920.

Joiner v. Diamond M. Drilling Co., 677 F.2d 1035, 1042 (5th Cir. 1982) has been described as the "premier" 5th Circuit case on the exercise of pendent/ancillary jurisdiction. See, *W. R. Grace v. Continental Casualty Co., Inc.*, 896 F. 2d 865, 870 (5th Cir. 1990). The *Joiner* Court examined in great depth the factors to be considered whenever a federal court is asked to "press against the outer limits of its jurisdiction" and adjudicate pendent claims:

> "*Gibbs* also tells us that federal courts must be ever mindful of the states' interest in the integrity and autonomous development of their own jurisprudence. Needless decisions of state law should be avoided ... as a matter of comity, and [f]ederal courts should not be overeager to hold on to the determination of issues that might be more appropriately left to settlement in state court. Thus, Gibbs teaches that federal courts must refrain from unnecessary poaching upon a sovereign state's jurisprudential turf."

The decision of the Supreme Court of Louisiana herein is in direct conflict with the highest court of Idaho. *Puckett v. City of Emmett*, 747 P.2d 48 (Idaho 1987). There the plaintiff originally brought a civil rights action in federal court which was decided adversely on a motion for summary judgment which was affirmed on appeal. He then instituted a state proceeding claiming breach of a settlement agreement allegedly reached during the course of the prior proceedings. The defendant contended that the federal court decison constituted res judicata barring the state claim. The federal appellate court had held that the state claim of breach was not an issue before the Court.

(Plaintiff had made an attempt to amend his federal complaint to add the state claim but there was no ruling on the record as to this amendment.) The state appellate court held that, under the federal law which is determinative of the res judicata effects of a federal judgment, the subsequent state court proceeding was not barred:

> Judge Callister's failure to so rule on the record in Puckett's case was in all likelihood a mere oversight. However, given the consistent rule applied by the Ninth Circuit in similar cases, it is clear what the court would and should have done. Even if leave to amend had been granted, the court in a proper exercise of discretion would have dismissed Puckett's state law claim along with his federal question cause of action.
>
> As discussed above, the consistent Ninth Circuit rule derived from *WHAM-O,* as adopted by the *Gibbs* court, is to ordinarily dismiss pendent state law claims when the accompanying federal cause of action is dismissed pursuant to a defense motion for summary judgment. The impact of this rule upon the doctrine of *res judicata* is this: when a court having jurisdiction would clearly have declined to exercise it as a matter of discretion, a second action on the dismissed or omitted claim should not be precluded. See Restatement (Second) of Judgments (1982), Sec. 25, Comment "e," *supra* and Wright and Miller, *supra* at pp. 95-96.

Under *Gibbs* and its progeny, the federal district court was under a mandate, absent exceptional circumstances, to dismiss all pendent state claims and allow

their resolution by the state court. The instant decision of the Louisiana Supreme Court holds that, absent exceptional circumstances, the federal district court should adjudicate pendent state claims, notwithstanding dismissal of the federal claims prior to the trial. This decision is clearly wrong. Petitioner is entitled to his day in state court on these state claims.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Bruce A. North
Counsel of Record
1100 Fourth Street
Gretna, Louisiana 70053
Phone: (504) 367-9001

APPENDIX A

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 399-429 DIVISION "O"

O. WILLIAM REEDER, JR.

VS.

THE SUCCESSION OF MICHAEL B. PALMER, ET AL

Filed
April 26, 1991

FILED: _____, 1991 _____
DEPUTY CLERK

JUDGMENT

This cause came to be heard on the 24th day of April, 1991 on Exceptions of No Cause of Action and Res Judicata. It was submitted on memos, argued, and taken under advisement.

PRESENT: Bruce A. North,
Attorney for plaintiff

Stephen W. Rider,
Attorney for defendant,
Bank of LaPlace

Ellis B. Murov,
Attorney for defendant,
Succession of Michael B. Palmer

After hearing the arguments of counsel, reviewing the pleadings and applicable law, it is the opinion of this court that there by judgment in favor of defendants, and accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Bank of LaPlace and Succession of Michael B. Palmer, maintaining their Exceptions of No Cause of Action and Res Judicata, dismissing plaintiff's case, with prejudice.

Gretna, Louisiana, this 26th day of April, 1991.

/s/ illegible

J U D G E

A TRUE COPY OF THE DOCUMENT
ON FILE IN THIS OFFICE.

/s/ illegible

DEPUTY CLERK
24th JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, LA.

APPENDIX B

O. WILLIAM REEDER, JR.	NO. 91-CA-617
VERSUS	COURT OF APPEAL
THE SUCCESSION OF MICHAEL B. PALMER, LYNN PAUL MARTIN, INDIVIDUALLY ANS D/B/A LPM ENTERPRISES AND BANK OF LAPLACE	FIFTH CIRCUIT STATE OF LOUISIANA

APPEAL FROM THE TWENTY-FOURTH
JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON - STATE OF LOUISIANA
NO. 399-429 - DIVISION "O"
HONORABLE RONALD P. LOUMIET

FRED S. BOWES
JUDGE

SEP 16 1992

Court composed of Judge Fred S. Bowes, H. Charles Gaudin, Thomas C. Wicker, Jr., James L. Cannella and Robert J. Burns, Pro Tempore

Gaudin, J. dissents in part.

BRUCE A. NORTH
David L. Colvin & Associates
1100 Fourth Street
Gretna, Louisiana 70053
Attorney for Plaintiff/Appellant,
O. William Reeder, Jr.

ELLIS B. MUROV
Deutsch, Kerrigan & Stiles
755 Magazine Street
New Orleans, Louisiana 70130
Attorney for Defendant/Appellee,
Succession of Michael B. Palmer

LYNN PAUL MARTIN
Saufley Field, Bldg. 2440
Federal Prison Camp
Pensacola, Florida 32509
Defendants, Lynn Paul Martin
and LPM Enterprises

STEPHEN W. RIDER
643 Magazine Street
New Orleans, Louisiana 70130
Attorney for Defendant/Appellee,
Bank of LaPlace

JOSEPH ACCARDO, JR.
P. O. Box 1990
LaPlace, Louisiana 70069
Attorney for Defendant/Appellee
Bank of LaPlace

AFFIRMED IN PART, ANNULLED IN PART AND REMANDED.

Plaintiff/appellant, Dr. O. William Reeder (hereinafter "Reeder"), appeals a judgment of the district court dismissing his petition against the defendant "Succession of Michael B. Palmer" (hereinafter "Palmer") by granting exceptions of no cause of action and res judicata.

PROCEDURAL HISTORY

On July 10, 1989, Reeder filed a complaint in the United States District Court for the Eastern District of Louisiana against various defendants, including Palmer, for alleged violations of 15 U.S.C. Sec. 77(a) et seq. (also called the "Securities Act of 1933"), 15 U.S.C. Section 78(a) et seq. (also known as the "Securities Exchange Act of 1934"), and LSA-R.S. 51:701 et seq. (also titled the "Louisiana Securities Law," and popularly known as the Blue Sky Law). In October, 1989 Judge Robert Collins orally granted the motion by Palmer to dismiss the complaint pursuant to Rules 12(b)(6) (Motion to dismiss for failure to state a cause of action) and 56 (Motion for summary judgment) of the Federal Rules of Civil Procedure. The dismissal was written and reported at 736 F.Supp. 128 (E.D. La. 1990) on April 25, 1990.

On May 10, 1990, Reeder filed a petition in the Twenty-Fourth Judicial District Court in Jefferson Parish against the same defendants. Much of the original petition filed in state court contains language *identical* to the federal court suit; the present petition omits allegations of violations under the federal laws, and confines itself to alleged breaches of (A) the Louisiana Blue Sky Law; (B) banking regulations, and (C) LSA-R.S. 51:1401, et seq. "Unfair Trade Practices and Consumer Protection Law."

With regard to Palmer, Reeder also made the following pertinent allegations:

IV.

Between October of 1986 and April of 1988, defendant, Lynn Paul Martin, individually and d/b/a LPM Enterprises (Martin), directly and indirectly through agents and representatives such as certain of the other defendants herein, induced numerous investors to invest in an investment scheme known as the "travel club." *In particular,* defendant, *Michael B. Palmer then d/b/a Palmer Investments* (Palmer), *approached plaintiff* about *investing* in the *"travel club."* At *all times* pertinent hereto, Palmer *held himself out* to plaintiff *as an investment advisor,* although he was *never* properly licensed as such.

V.

Both Martin *and Palmer* maintained *personal contact with plaintiff* and *represented to plaintiff* that the funds so *invested* were *to be used* by the "travel club" to purchase blocks of airline tickets to provide transportation for the account of various gambling casinos in Las Vegas, Nevada. It was *further represented to plaintiff* that he would be paid *dividends* amounting to 6% per month on the total amount of his investment in the "travel club."

VI.

It was *further represented to plaintiff* that

he could *withdraw any or all* of the monies, including principal or dividends, invested by notifying Palmer and/or Martin on or before the 10th day of the month.

* * *

XXV.

Further, by *holding himself out as an investment counselor,* although he was *never so licensed,* the defendant, Palmer, induced plaintiff into a course of action from which plaintiff suffered damages. Therefore, the defendant, Michael Palmer, through his succession is liable to plaintiff for the breach of the contract between them.

[Emphasis ours].

On January 28, 1991, Reeder amended his petition to include, among other things, the following claims pertinent to Palmer:

XXVI.

Palmer knew or should have known that the travel club scheme perpetrated by Martin was fraudulent in nature; further, Palmer owed a duty to plaintiff to discover and present the scheme from continuing to operate to plaintiff's and others' detriment. Palmer breached this special and fiduciary duty by failing to discover and prevent the fraudulent scheme from operating, thereby causing damage to plaintiff as aforesaid.

In March, 1991, Palmer filed exceptions of res judicata, peremption, prescription, and no cause of action. Following submission of memoranda and oral argument, the exceptions were taken under advisement and on April 26, 1991, the court, without written reasons, maintained the exceptions of no cause of action and res judicata, dismissing Reeder's case with prejudice. It is from this judgment that plaintiff appeals.

FACTS

Briefly stated, between October of 1986 and April of 1988, defendant, Lynn Paul Martin, individually and d/b/a LPM Enterprises (Martin), directly and indirectly through agents and representatives such as certain of the other defendants herein, induced numerous investors to invest in an investment scheme known as the "Travel Club."

In essence, Martin's scheme involved obtaining monies from individuals, such as Dr. Reeder, "to purchase blocks of airline tickets to provide transportation for the account of various gambling casinos in Las Vegas, Nevada." It is alleged Martin, directly or through his agents, promised to return all the monies, upon request, plus pay interest at the rate of six (6%) percent per month on the total invested. Reeder invested some $185,600.00 in the travel club.

The transactions were conducted in the following manner. For contribution to the investment, Reeder would give checks payable to Palmer (with one exception - a $45,000 check payable to Martin) on a frequent basis (about monthly). For payments representing a return on

the investment Palmer would give Reeder one check, which allegedly represented Reeder's principal and one check which allegedly represented interest due on the investment. These checks were all *post-dated* and, unknown to Reeder, had been written by Martin to Palmer when he (Martin) received Reeder's funds, but they were covered actually by funds obtained from other new unidentified investors. All checks in payment to Reeder were drawn on Palmer's account (with one exception - on LPM Enterprises).

In April, 1988, Martin turned himself in to federal authorities and confessed to having operated a fraudulent operation known as a "ponzi scheme." In May of 1988, Palmer committed suicide.

ASSIGNMENTS OF ERROR

Appellant assigns as error the fact that the trial court erred in maintaining the exceptions of res judicata and no cause of action.

ANALYSIS

RES JUDICATA

With regard to res judicata, Reeder argues that the federal court dismissed the state "Blue Sky" claim under its "pendent" jurisdiction prior to a trial on the merits, and therefore, the federal judgment cannot preclude the present action. To this end plaintiff cites the case of *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 218 (1966), in which the Supreme Court analyzed "pendent" jurisdiction. The court held in *Gibbs*

that federal courts exercising federal question jurisdiction had power to hear *state* claims under certain circumstances under its "pendent" jurisdiction.

We do not find it necessary to analyze *Gibbs* for our purposes because the United States District Court assumed pendent jurisdiction of the Blue Sky claim pursuant to the complaint filed by plaintiff in which plaintiff *requested* the federal court to invoke its "pendent" jurisdiction - and so it did. In its decision, which was affirmed by a Per Curiam opinion in the United States Court of Appeals for the Fifth Circuit, the court analyzed the Louisiana law as well as the documents involved, and found that the post-dated checks employed in the present case are "drafts," and, as such, are excluded by the LSA-R.S. 51:702(15) et seq., commonly known as the Louisiana Securities Act. Following a complete analysis of all of Reeder's claims by that court in a written, published opinion, *all* were dismissed *with prejudice.* Palmer had brought a motion to dismiss for "failure to state a claim upon which relief could be granted" (which is roughly equivalent to our state court "Exception of No Cause of Action") *and* a motion for summary judgment. Both motions were granted. We conclude, therefore, that the federal matter has been completely adjudicated.

The judgment in this federal case has now become final; ergo, the issue of whether or not Reeder may bring a claim under the Blue Sky laws in state court is res judicata because the federal court clearly found that a claim does not arise under Louisiana security laws.

With regard to the question of *Res Judicata* under

our state laws, LSA-R.S. 13:4231, as it was effective at the time the state court lawsuit was filed, reads as follows:

> The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

Additionally, the United States Fifth Circuit has stated in *Matter of Howe,* 913 F.2d 1138 (5th Cir. 1990) its requirements for a matter to become res judicata as follows:

> The law in this circuit is well settled that a plan is binding upon all parties once it is confirmed and all questions that could have been raised *pertaining to such plan* are res judicata. This circuit's test for res judicata requires that:
>
> (1) The parties be identical in both suits,
>
> (2) A court of competent jurisdiction rendered the prior judgment,
>
> (3) There was a final judgment on the merits in the previous decision, and
>
> (4) The plaintiff raises the same cause of action or claim in both suits.

Also *Nelson v. City of Mass. Point,* 701 F.2d 556 (5th Cir. 1983).

A careful reading and comparison of both petitions, that filed in federal court and the one filed in state court (the matter sub judice), and the opinions and rulings of the federal court, convinces us that the federal requirements for a holding of res judicata as to the alleged violations of the Louisiana Securities laws have been met; and we are likewise of the opinion that the claim by Reeder in our state court for the same violations of our Blue Sky laws also clearly meets the criteria for a holding of res judicata under LSA-R.S. 13:4231, *supra*.

Accordingly, we find no manifest error on the part of the trial court in maintaining the exception of res judicata with regard to *this* portion of Reeder's petition for damages and its dismissal of same. However, this does not apply to Reeder's additional claims against Palmer *personally* under the Louisiana Unfair Trade Practices Act and those sounding in tort and in contract, which were *not included* in the federal petition and which are discussed hereinafter.

PRESCRIPTION

Palmer timely filed exceptions of prescription in the trial court below but that court did give a ruling on same. He now argues in this Court, on appeal, in brief, that most of the claims Reeder urges have prescribed. Even though the exception of prescription was not the basis of dismissal in the trial court (because no ruling was issued), the exception is still before this appellate court and must be decided by us pursuant to LSA-C.C.P. art. 2163. *Allen v. Michell*, 303 So.2d 214 (La.App. 4 Cir. 1974); *Thompson v. Cane Gardens Apartments*, 442 So.2d 1296 (La.App. 3 Cir. 1983); *Myers v. City of Lafayette*, 537 So.2d 1269 (La.App. 3 Cir. 1989).

We are of the opinion that the claim against Palmer under the unfair trade practices act, LSA-R.S. 51:1401 et seq., has clearly prescribed. LSA-R.S. 51:1409 discusses private actions by a persons who are victims of unfair and/or deceptive trade practice. Section (E) states:

> The action provided by this section shall be prescribed by one year running from the time of the transaction or act which gave rise to this right of action.

This period has been interpreted to be "peremptive" and not subject to interruption or suspension. *Spencer-Wallington, Inc. v. Service Merchandise,* 562 So.2d 1060 (La.App. 1 Cir. 1990); *Canal Marine Supply v. Outboard Marine,* 522 So.2d 1201 (La.App. 4 Cir. 1988). The state petition in this case claims that the transactions in question took place between October of 1986 and April of 1988. The original petition was filed in May of 1990. Obviously, more than one year has elapsed from "the time of the transaction or the act which gave rise to this right of action." Therefore, the action for unfair and /or deceptive trade practices has prescribed and must be dismissed.

Insofar as the petition attempts to state a cause of action for negligent or intentional torts on the part of Palmer personally, these claims have also prescribed. Reeder acknowledges and the record discloses that Martin turned himself into the authorities in April of 1988 and that Palmer committed suicide the following month. Under LSA-C.C. art. 3492, the prescriptive period for delictual actions is one year which commences to run from the day the damage is sustained.

In *Restrepo v. Fortunato,* 556 So.2d 1362 (La.App. 5 Cir. 1990), this Court stated as follows:

> Where the claim has prescribed on its face and the plaintiff relies upon a suspension of prescription, he bears the burden of establishing suspension. *Guice v. Mustakes,* 490 So.2d 390 (La.App. 5th Cir. 1986). Under the doctrine of contra non valentem, prescription does not begin to run until the plaintiff knows sufficient facts and has a reasonable basis for filing suit against a certain defendant. *Jordan v. Employee Transfer Corp.,* 509 So.2d 420 (La. 1987).

Reeder *should* have become *aware* of facts sufficient to constitute either a negligent or intentional misrepresentation, as well as fraud, in April of 1988 when Martin turned himself in. Since even his federal suit was not filed until July, 1989, over one year after he had a reasonable basis for doing so, his delictual claims have, in our opinion, prescribed in the suit before us.

NO CAUSE OF ACTION

LSA-C.C. art. 3013 states as follows:

> The mandatary is responsible to those with whom he contracts, only when he has bound himself personally, or when he has exceeded his authority without having exhibited his powers.

We believe that a fair and logical reading of paragraph IV of the petition alleges that Palmer was an agent of Martin and represented him as such, and,

therefore, Martin was a disclosed principal. In fact, counsel for Dr. Reeder emphatically urges this interpretation on pages 34 and 35 of his original brief. If Palmer was, indeed, the agent only, of Martin, then he is not liable for Martin's actions since an agent who discloses the identity of his principal cannot be personally liable for the acts of his principal. *Roran Corp. v. Carron,* 345 So.2d 1239 (La.App. 1 Cir. 1977); *Waguespack-Pratt v. Ten-O-One Howard Ave.,* 449 So.2d 657 (La.App. 4 Cir. 1984). Under these circumstances the petition does not state a cause of action.

However, in paragraph XXVI, Reeder alleges a breach of special and fiduciary duty on the part of Palmer *himself* whom, he alleges *personally* made false representations to him concerning the investments and in failing to discover and prevent the fraudulent scheme in question. He further alleges that Palmer knew, or should have known, of the fraud perpetrated by Martin. When this averment is combined with the earlier allegations that Palmer held himself out as an investment counselor, which he was not, it appears to us that Reeder has attempted to characterize Palmer as a broker, and as acting individually to cause his damages, particularly when he alleges, in paragraph XXV, that there was a "breach of contract" between himself and Palmer.

In *Succession of Dubos,* 453 So.2d 323 (La.App. 4 Cir. 1984), a plaintiff complained that his broker was negligent in handling a sale of certain securities; but he also alleged that the defendant breached its obligation as a fiduciary. In explaining that the same conduct can give rise to an action in contract as well as in tort the court said:

> The same acts or omissions may constitute

> breaches of *both* general *and contractual duties,* and *give rise to actions both* in tort *and in contract.* A plaintiff may assert both actions without the necessity of pleading the theory of his case. *Free v. Franklin Guest Home, Inc.,* 397 So.2d 47 (La.App. 2nd Cir. 1981), writ denied 401 So.2d 975 (La. 1981). Although the petition alleges that relator was 'negligent' in handling the sale of the securities without first requiring a judgment of court authorizing the sale, it further alleges that relator thereby 'failed to meet the obligations as a fiduciary and observe the fidelity imposed upon brokers by law." We interpret this pleading as a personal action for relator's breach of contract or obligation to perfrom its fiduciary duty as a securities broker, which is subject to a ten year prescriptive period. LSA-C.C. Art. 3499; *Kline v. Globe Automobile Finance Company,* 100 So.2d 517 (La.App. Orl. 1958).
>
> [Emphasis ours].

We have already held, *supra*, that any tort or delictual actions against Palmer have prescribed by the prescription of one year. However, a thorough reading of the petition in question convinces us that Dr. Reeder may well have an action in *contract* that has not prescribed. We feel that the trial court was correct in its finding that the petition did not state a cause of action (in contract) with *sufficient specificity* as it is presently drawn. Breach of contract and breach of fiduciary duty are both alleged *as conclusions*, without stating sufficient underlying facts, as a basis for the allegations. Therefore, a cause of action was not properly or sufficiently stated. From a reading of the

petition in toto, the relationship between Palmer and Reeder is ambiguous at the present time. However, it appears that it is entirely possible for Reeder to still state a cause of action against Palmer which has not prescribed, and which is not res judicata. Reeder may have a cause of action in contract, if he can unambiguously allege facts, instead of conclusions, to show a contract between himself and Palmer, as broker or otherwise.

In reality, it defies logic and reason to say that, under the circumstances pointed out above, that Palmer did not know exactly the fraud that Martin was indulging in to the detriment of plaintiff as he allegedly personally helped Martin carry out the scheme and allegedly made many false representations to plaintiff himself. If these allegations are true, it shocks conscience and a sense of fairness if a man in Palmer's position cannot be held accountable for his actions. Plaintiff is entitled to a second chance to try to hold him accountable in contract through an amendment of his petition.

Moreover, under LSA-C.C.P. art. 934, the trial court could have allowed Reeder leave to amend to state a cause of action. Even though one amending petition had already been filed, it is within the discretion of the trial court to determine whether an exception of no cause of action can be defeated by a further amendment. *Robinson v. Estate of Haynes*, 433 So.2d 294 (La.App. 1 Cir. 1983). Under the circumstances of the present case, we find that the trial judge erred and it was an abuse of discretion to dismiss Reeder's suit with prejudice without allowing him the opportunity to amend his petition in another attempt to state a cause of action.

For the foregoing reasons, that portion of the judgment of the trial court maintaining the exceptions of res judicata and no cause of action is affirmed; that portion of the judgment dismissing the suit with prejudice is annulled and set aside; and the case is remanded to the trial court, with instructions to grant appellant a reasonable time within which to amend his petition in an attempt to state a cause of action in contract against Palmer in accordance with this opinion. Each party to bear his own costs on appeal.

AFFIRMED IN PART, ANNULLED IN PART AND REMANDED.

O. WILLIAM REEDER, JR.	NO. 91-CA-617
VERSUS	COURT OF APPEAL
THE SUCCESSION OF MICHAEL B. PALMER, LYNN PAUL MARTIN, INDIVIDUALLY ANS D/B/A LPM ENTERPRISES AND BANK OF LAPLACE	FIFTH CIRCUIT STATE OF LOUISIANA

GAUDIN, J. DISSENTING IN PART.

I respectfully dissent in part. I agree with that portion of the foregoing opinion affirming the judgment of the district court which maintained exceptions of res judicata and no cause of action. I further believe that the trial judge was correct in dismissing the district court with prejudice; accordingly, I dissent from the remand to allow plaintiff an opportunity to state a cause of action in contract.

COURT OF APPEAL, FIFTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, Gretna, **OCT 19 1992** , 198

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

O. WILLIAM REEDER, JR. v. THE SUC. OF MICHALE B. PALMER, ET ALS

No. 91 CA 617

Very truly yours,
PETER J. FITZGERALD, JR., Clerk

APPENDIX C

Supreme Court of Louisiana

Nos. 92-C-2965 and 92-C-3002

O. William Reeder

versus

The Succession of Michael B. Palmer,
Lynn Paul Martin, Individually and d/b/a
LPM Enterprises and Bank of LaPlace

On Writ of Certiorari to the
Fifth Circuit Court of Appeal
Parish of Jefferson

SEP 3 1993

Dennis, Justice.*

The question before us is whether this state court action is barred by res judicata because of a prior federal court judgment in the defendants' favor in a suit based on the same factual transaction or wrong as the instant case. Reeder sued for damages in federal court under federal securities statutes as the result of an alleged Ponzi or pyramid scheme perpetrated by Martin, Palmer, and others, and included a pendent state securities law claim (*Reeder I*). The federal district court dismissed Reeder's case with prejudice for failure to state a claim on the ground that post-dated checks, issued to Reeder in return

---

* Watson, J. not on panel. Rule IV, Part 2, § 3.

for his investments in a bogus air travel business, did not qualify as "securities" or "investment contracts" under federal or Louisiana securities law. Reeder v. Succession of Palmer, 736 F.Supp. 128 (E.D.La. 1990). The federal court of appeal affirmed without opinion. Reeder v. Succession of Palmer, 917 F.2d 560 (5th Cir. 1990).

Reeder then sued Martin and Palmer in a virtually identical action in state court, with the exceptions that his petition did not rely on federal statutes and included not only state securities claims, but also state contract, tort and unfair trade practices claims. (*Reeder II*). The state trial court sustained the defendants' exceptions of res judicata and no cause of action, and dismissed Reeder's case with prejudice. The state court of appeal affirmed in part and reversed in part, holding that the federal court's dismissal of the state securities law claim operated as an adjudication on the merits for res judicata purposes, that the state tort claims had prescribed, that the state unfair trade practices claim was perempted, but that, although Reeder failed to state a cause of action in contract, his state law claim on this ground was not barred by res judicata and, therefore, he would be allowed an opportunity to amend his petition to remedy this deficiency. Reeder v. Succession of Palmer, 604 So.2d 1070 (La.App. 5th Cir. 1992).

We reverse the court of appeal judgment in part and reinstate the trial court's judgment dismissing Reeder's state case with prejudice. The federal court had pendent jurisdiction over all of Reeder's state law claims because they arose out of the same transaction or wrong as those presented in the federal proceeding. Therefore, Reeder was

obligated to file in his first suit all the legal theories he wished to assert. The res judicata effect of the federal court judgment precludes the omitted state law claims because it is not clear that the federal district court would have declined to exercise pendent jurisdiction over them.

1. BACKGROUND

Dr. O. William Reeder filed a complaint in federal court alleging that Lynn Paul Martin, the late Michael B. Palmer, and others had defrauded him in violation of federal and Louisiana securities laws by operating an alleged Ponzi or pyramid scheme. (hereinafter *Reeder I*). Reeder's complaint specifically requested that the federal district court exercise pendent jurisdiction over plaintiff's factually-related state securities law claim filed in the federal proceeding.

According to Reeder's complaint, Palmer initially persuaded him in October of 1986 to invest in Martin's "travel club" and thereafter acted as intermediary between him and Martin. Palmer and Martin allegedly solicited funds from individuals to purchase blocks of advance airline tickets for groups taking gambling trips to Las Vegas casinos, for which the casinos were to reimburse Martin and pay a commission. Martin purportedly promised to return all of the funds invested plus interest at the rate of 6% per month on the total invested. In reality, the "travel club" never engaged in legitimate business, and when the club repaid capital contributions and so-called dividends, the money was covertly taken from capital invested by other victims of the scheme. Reeder alleged that with each investment he received two post-dated checks

drawn on Martin's account with the Bank of LaPlace; one check represented a return of principal, and the other represented a fixed interest payment. Reeder's complaint stated that over the course of one and one-half years, he invested approximately $245,000 in Martin's "travel club" and received only $68,000 in return, for a net loss of $185,000.

In April of 1988, Martin turned himself in to federal authorities and confessed to having operated a Ponzi scheme in violation of federal securities laws. Martin was indicted and pleaded guilty to federal criminal charges in connection with that scheme. See United States v. Lynn Paul Martin, No. 89-390 "C" (2) (E.D. La.). Because Palmer committed suicide in May of 1988, his succession was named as a defendant in *Reeder I*.

In *Reeder I*, the federal district court concluded that no "securities" as defined under the federal or state securities laws were involved in Martin's "travel club" scheme and dismissed Reeder's case with prejudice. Reeder v. Succession of Palmer, 736 F.Supp. 128 (E.D. La. 1990). The federal appellate court affirmed. Reeder v. Succession of Palmer, 917 F.2d 560 (5th Cir. 1990). Reeder then activated a previously-filed state court suit against Martin and Palmer based on a petition virtually identical to his federal court action (*Reeder II*). Reeder sought damages based on factual allegations substantially the same as those in his federal complaint but grounded his suit in state securities law and other state law theories, rather than on federal statutes. The state trial court sustained the defendants' exceptions of res judicata and no cause of action, and dismissed *Reeder II* with prejudice. The state court of

appeal agreed that res judicata barred the state securities law claim, disposed of other claims on different grounds, but held that the contract claim was not barred by the federal court judgment. Reeder v. Succession of Palmer, 604 So.2d 1070 (La.App. 5th Cir. 1990). We granted certiorari to determine whether the court of appeal correctly applied the principles of res judicata.

2. LAW AND ANALYSIS

When a state court is required to determine the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction, it is the federal law of res judicata that must be applied. McNeal v. Pain, Webber, Jackson & Curtis, 249 Ga. 662, 293 S.E.2d 331 (1992); Anderson v. Phoenix Inv. Counsel of Boston, 440 N.E.2d 1164 (Mass. 1982); Rennie v. Freeway Transport, 294 Or. 319, 656 P.2d 919 (1982); Jeanes v. Henderson, 688 S.W.2d 100 (Tex. 1985), reh'g of cause overruled (May 1, 1985); Commercial Box & Lumber Co. v. Uniroyal, Inc., 623 F.2d 371, 373 (5th Cir. 1980); Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), appeal dismissed and cert. denied, 423 U.S. 908 (1975); Restatement (Second) of Judgments § 87 (1982); C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, Jurisdiction § 4468 (1981). Cf. Pilie & Pilie v. Metz, 547 So.2d 1305 (La. 1989). Federal res judicata principles have been heavily influenced by the great advances in the Restatement Second of Judgments. Federal courts and commentators often cite and rarely depart from the Restatement view. 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4401 (1981).

Under federal precepts, "claim preclusion" or "true

res judicata" treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." When the plaintiff obtains a judgment in his favor, his claim "merges" in the judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a "bar." Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial. The aim of claim preclusion is thus to avoid multiple suits on identical entitlements or obligations between the same parties, accompained, as they would be, by the redetermination of identical issues of duty and breach. Kasper Wire Works, Inc. v. Leco Engineering & Mach. 575 F.2d 530 (5th Cir. 1978) (Rubin, J.; citing authorities). See Restatement (Second) of Judgments §§ 18-20 (1982).

Claim preclusion will therefore apply to bar a subsequent action on res judicata principles where parties or their privies have previously litigated the same claim to a valid final judgment. In most cases, the key question to be answered in adjudging the propriety of a claim preclusion defense is whether in fact the claim in the second action is "the same as," or "identical to," one upon which the parties have previously proceeded to judgment. The authorities do not provide a uniform definition of the terms "claim" or "cause of action" in connection with the application of res judicata. The clear trend, however, in the most recent decisions, in harmony with such procedural concepts as the "transaction or occurrence" test for compulsory counterclaims as stated in Federal Rules of Civil Pro-

cedure, Rule 13(a) and the "common nucleus of operative fact" standard for pendent federal jurisdiction of United Mine Workers v. Gibbs, 383 U.S. 715 (1966), has been towards the adoption of § 24 of the Restatement 2d, of Judgments. The Section sets forth a "transactional analysis" as to what constitutes a "claim," the extinguishment of which prohibits subsequent litigation with respect to the transaction(s) from which it arose. A majority of the federal circuit courts, as well as the Claims Court, have thus far expressly adopted the Restatement's transactional approach. Annotation, Proper Test to Determine Identity of Claims for Purposes of Claim Preclusion by Res Judicata Under Federal Law, 82 A.L.R. Fed. 829, 837 (1987); e.g., Southmark Properties v. Charles House Corp., 742 F.2d 862, (5th Cir. 1984). See Pilie & Pilie v. Metz, 547 So.2d 1305, 1310 (La. 1989) (citing authorities).

Section 24 of the Restatement (Second) of Judgments (1982) adopts a "transactional" view of claim for purposes of the doctrines of merger and bar, as follows:

> § 24. Dimensions of "Claim" for Purposes of Merger or Bar—General Rule Concerning "Splitting"
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

> (2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Illustrations of how the rule of § 24 applies to various situations are set forth in Restatement (Second) of Judgments § 25 (1982) as follows:

> § 25. Exemplifications of General Rule Concerning Splitting
>
> The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action
>
> (1) To prevent evidence or grounds or theories of the case not presented in the first action, or
>
> (2) To seek remedies or forms of relief not demanded in the first action.

Comment e of § 25 of the Restatement (Second) of Judgments (1982) explains the effects of the rules of §§ 24 and 25 in a case in which a given claim may be supported by theories or grounds arising from both state and federal law as follows:

> A given claim may find support in theories or grounds arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both throries or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground. If however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded.***

See, e.g., Texas Employers' Ins. Ass'n v. Jackson, 862 F.2d 491, 501 (5th Cir. 1988); Langston v. Insurance Co. of North America, 827 F.2d 1044, 1046-47 (5th Cir. 1987); Ocean Drilling & Explor. Co. v. Mont Boat Rental Serv., Inc., 799 F.2d 213, 216, 217 (5th Cir. 1986) applying §§ 24 and 25 of Restatement (Second) of Judgments (1982).

Succinctly stated, if a set of facts gives to a claim based on both state and federal law, and the plaintiff brings the action in a federal court which had "pendent" jurisdiction to hear the state cause of action, but the plaintiff fails or refuses to assert his state law claim, res judicata prevents him from subsequently asserting the state claim in a state court action, unless the federal court clearly would not have had jurisdiction to entertain the omitted state claim, or, having jurisdiction, clearly would have declined to exercise it as a matter of discretion. Restate-

ment (Second) of Judgments §§ 24, 25 and 26, Comment e. E.g., Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1315 (5th Cir. 1971); Anderson v. Phoenix Inv. Counsel of Boston, 440 N.E.2d 1164, 1168 (Mass. 1982). In cases of doubt, therefore, it is appropriate for the rules of res judicata to compel the plaintiff to bring forward his state theories in the federal action, in order to make it possible to resolve the entire controversy in a single lawsuit. Restatement (Second) of Judgments § 25, Reporter's Note at 228; Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1315 (5th Cir. 1971). Applying these precepts to the case at hand, we conclude that each of the state law claims asserted by the plaintiff in *Reeder II* is precluded by the res judicata bar of the federal court judgment dismissing *Reeder I* with prejudice.

First, the present state law claims arise from the same set of facts or transaction as the federal and state securities law claims which the parties litigated to a valid final judgment on the merits in the federal court. The text and substance of the Ponzi scheme transaction or series of connected transactions alleged in the two actions are virtually the same, both involving the alleged intentional and/or negligent misrepresentations by Martin, Palmer and others to Reeder and other investors disguising the true nature and operations of the alleged travel club pyramid scheme and the precariousness of thier investments.

Second, the federal district court had pendent jurisdiction to hear the state law claims which Reeder chose not to assert in that forum. Pendent jurisdiction, in

the sense of judical power, exists when there is a federal claim of "substance sufficient to confer subject matter jurisdiction on the court," and the relationship between that claim and the state claim is such that they "derive from a common nucleus of operative fact," so that "if, considered without regard to their federal or state character, a plaintiff[] ... would ordinarily be expected to try them all in one judicial proceeding. . . ." United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

The requirement of substantiality does not refer to the value of the interests that are at stake but to whether there is any foundation of plausibility to the claim. Duke Power v. Carolina Environmental Study Group, Inc. 438 U.S. 59 (1978); Garvin v. Rosenau, 455 F.2d 233 (6th Cir. 1972). If the plaintiff raises a substantial federal question, the court has jurisdiction of the case and its decision must go to the merits of the case. A loose factual connection between the claims has been held enough to satisfy the requirements that they arise from a common nucleus of operative fact and that they be such that a plaintiff 'ordinarily would be expected to try them all in one judicial proceeding. Tower v. Moss, 625 F.2d 1161 (5th Cir. 1980); Frye v. Pioneer Logging Machinery, Inc., 555 F.Supp. 730 (D.C. S.C. 1983), citing Wright, Miller & Cooper, Federal Practice and Procedure. See id., § 3567.1 (1984). Therefore, it is clear that under these principles the federal court in *Reeder I* had pendent jurisdiction, in the sense of judical power, over Reeder's state law claims arising from the same transaction as his federal question claim. In fact, Reeder, by his own federal complaint, invoked the *Reeder I* court's exercise of pendent jurisdiction over his state securities law claim.

Third, we cannot say that the federal district court in Reeder I "would clearly have declined to exercise" its pendent jurisdiction over the omitted state law tort, contract, unfair trade practice claims, and other state claims if Reeder had advanced them in that court along with his state law securities act claim. Pendent jurisdiction is a doctrine of discretion which allows the trial court a wide latitude of choice in deciding whether to exercise that judicial power. See Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). A federal court must consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state law claims. When the balance of these factors indicates that a case properly belongs in state court, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice. The doctrine of pendent jurisdiction thus is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988); Rosado v. Wyman, 397 U.S. 397 (1970); United Mine Workers v. Gibbs, supra.

In Gibbs, the Court stated that "if the federal claims are dismissed before trial...the state claims should be dismissed as well." 383 U.S., at 726. More recently, however, the Court has made clear that this statement does not establish a mandatory rule to be applied inflexibly in all cases. Jurisdiction is thus not automatically lost because the court ultimately concludes that the federal claim is without merit. See Carnegie-Mellon Univ. v. Cohill, 484

U.S. at 350, n.7; Rosado v. Wyman, 397 U.S. at 403-405. In fact, a countervailing policy in favor of hearing pendent state claims was expressed by the Court in Hagans v. Lavine, 415 U.S. 528 (1974): "[I]t is evident from Gibbs that pendent state law claims are not always, or even almost always, to be dismissed and not adjudicated. On the contrary, given advantages of economy and convenience and no unfairness to litigants, Gibbs contemplates adjudication of these claims." Id. at 545-546.

The principles and standards of pendent jurisdiction support and mesh with the principles of res judicata. The plaintiff is required to bring forward his state theories in the federal action in order to make it possible to resolve the entire controversy in a single lawsuit. Restatement (Second) of Judgments § 25, Reporter's Note at 228 (1982); Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d at 1315. The federal district court, exercising its discretion, may decline jurisdiction of some or all of the plaintiff's state law claims if the court finds that the objectives of judicial economy, convenience and fairness to litigants, as well as other factors, will be served better thereby. United Mine Workers v. Gibbs, 383 U.S. at 726. To insure that this decision will be made fairly and inpartially by the court, rather than by a party seeking the tactical advantage of splitting claims, however, the claim preclusion rules further provide that, unless it is clear that the federal court would have declined as a matter of discretion to exercise its pendent jurisdiction over state law claims omitted by a party, a subsequent state action on those claims is barred. Restatement (Second) of Judgments § 25, Comment e; Woods Exploration and Producing Co. v. Aluminum Co. of America, supra; Anderson v. Phoenix

Inv. Counsel of Boston, 440 N.E.2d at 1169.

In view of the breadth of the federal trial courts' discretion and the necessary indeterminacy of the discretionary standards, in order for a subsequent court to say that a federal district court clearly would have declined its jurisdiction of a claim not filed, the subsequent court must find that the previous case was an exceptional one which clearly and unmistakably required declination. The rules do not countenance a plaintiff's action in failing to plead a theory in a federal court with the hope of later litigating the theory in a state court as a second string to his bow. Therefore, the action on such omitted claims is barred if it is merely possible or probable that the federal court would have declined to exercise its pendent jurisdiction. Restatement (Second) of Judgments § 25, Comment e. See also Anderson v. Phoenix Inv. Counsel of Boston, 440 N.E.2d 1164, 1169 (Mass. 1982).

Reeder I was not an exceptional case in which the federal court clearly or unmistakably would have declined to exercise its pendent jurisdiction over the related state law claims, had Reeder included them in his complaint. In fact, the federal court did not decline to exercise its pendent jurisdiction over the only state law claim that it was asked to adjudicate, *viz.*, Reeder's claim for damages based on state securities law arising out of the same transaction or series of connected transactions as the state tort, contract, and unfair trade practices claims. Because the federal district court had *exclusive* jurisdiction of one of the federal securities law claims, 15 U.S.C. § 78aa, the federal court was the only forum in which it was possible to resolve the entire controversy in a single lawsuit. In these cir-

cumstances, the assertion of pendent jurisdiction is especially compelling. Cf., Aldinger v. Howard, 427 U.S. 22, 18 (1976); Boudreaux v. Puckett, 611 F.2d 1028, 1031 (5th Cir. 1978) (discussing pendent party jurisdiction where the federal court maintains exclusive jurisdiction over the underlying federal claim).

In a very similar case arising out of the same Ponzi scheme, the same federal district court did not decline pendent jurisdiction over state securities, fraud, and negligence law claims even after dismissing the federal securities law claim with prejudice for failure to state a claim. In fact, the federal district court considered and rendered final judgment on the merits on each of the pendent state law claims, ultimately dismissing each claim with prejudice. Guidry v. Bank of LaPlace, 740 F.Supp. 1208 (E.D. La. 1990). On appeal, the Guidry court of appeal affirmed as to the dismissal of some of the state claims with prejudice, but required that some be dismissed without prejudice. Moreover, that court did not say that the federal district court clearly should have declined to exercise jurisdiction even as to the few pendent state law claims that were dismissed without prejudice. Guidry v. Bank of LaPlace, 954 F.2d 267 (5th Cir. 1992). Therefore, in the present case, although it may have been *possible* for the district court to decline pendent jurisdiction of the omitted remaining state law claims, we cannot say that it was even probable, much less clear or unmistakable, that the federal court would have done so.

Our conclusion in this regard is bolstered by opinions of other courts which have held that, by the operation of federal res judicata principles, federal judgments under

federal securities acts barred subsequent suit between the same parties deriving from a common nucleus of operative facts presenting state claims omitted from the earlier federal proceeding. See McNeal v. Pain, Webber, Jackson & Curtis, Inc., 249 Ga. 662, 293 S.E.2d 331 (1992) (federal judgment under Securities Exchange Act of 1934 barred negligence, breach of fiduciary duty, and fraud claims in state court); Anderson v. Phoenix Investment Counsel of Boston, Inc., 387 Mass. 444, 440 N.E.2d 1164 (1982) (federal judgment under Investment Advisers Act of 1940 barred unfair and deceptive trade practices claim in state court); Rennie v. Freeway Transport, 294 Or. 319, 656 P.2d 919 (1982) (federal judgment under the Securities Exchange Act of 1934 barred fraud claim in state court); Jeanes v. Henderson, 688 S.W.2d 100 (Tex.), reh'g of cause overruled (May 1, 1985) (federal judgment under Securities Exchange Act of 1934 barred declaratory judgment action in state court). See also Browning v. Debenture Holders Comm. v. DASA Corp., 560 F.2d 1078 (2d Cir. 1977) (prior final judgment based on federal securities laws barred litigation of pendent claims, even if the prior judgment did not explicitly rule on state law breach of fiduciary duty claims). In each of these cases, the state court could not find that it was clear, unmistakable or highly probable that the federal district court would have declined to exercise pendent jurisdiction over the factually-related state law claims. Thus, in each of the respective cases, federal res judicata barred the state claims later presented in state court.

DECREE

For these reasons, the judgment of the court of appeal affirming the trial court judgment sustaining the exception of res judicata as to the state securities claim is affirmed. The judgment of the court of appeal reversing the balance of the trial court's judgment is vacated. The trial court's judgment dismissing *Reeder II*, in its entirety, with prejudice is therefore reinstated.

AFFIRMED IN PART; REVERSED IN PART.

APPENDIX D

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEW RELEASE

NEWS RELEASE # 105

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 7th day of October, 1993, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below

REHEARINGS DENIED:

92-C - 2178
C/W
92-C - 2180

DAVID P. NORTON AND TAMMIE NORTON, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF THEIR MINOR DAUGHTER, WHITNEE NORTON v. DARRIN K. LEWIS, PRICE LEBLANC, INC. D/B/A PRICE LEBLANC TOYOTA, ROYAL INSURANCE COMPANY AND STATE FARM INSURANCE COMPANY (Parish of East Baton Rouge)
CALOGERO, C.J. - not on panel.
WATSON, J. - would grant a rehearing.

92-WA- 2311

COX CABLE NEW ORLEANS, INC., v. THE CITY OF NEW ORLEANS C/W COX CABLE NEW ORLEANS, INC. v. PAUL MITCHELL, ETC. (Parish of Orleans)
MARCUS, J. - would grant a rehearing.
DENNIS, J. - not on panel.
WATSON, J. - would grant a rehearing.

92-C - 2965 O. WILLIAM REEDER, JR. v. THE SUCCESSION OF MICHAEL B. PALMER, LYNN PAUL MARTIN, INDIVIDUALLY AND D/B/A LPM ENTERPRISES AND BANK OF LAPLACE (Parish of Jefferson)
WATSON, J. - not on panel.

92-C - 3017 HAE WOO YOUN V. MARITIME OVERSEAS CORP., ATLANTIA TANKER CORP., AND ASSURANCEFORENGEN GARD (Parish of St. James)
WATSON, J. - not on panel.

93-C - 0472 WILMER CHAMBERLAIN AND BEVERLY LEBLANC CHAMBERLAIN INDIVIDUALLY AND ON BEHALF OF THEIR MINOR SON, CHAD ANTHONY CHAMBERLAIN v. STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, AND ABC LIGHTING & ELECTRICAL CONTRACTORS, INC. (Parish of Terrebonne)
MARCUS, J. - would grant a rehearing.
KIMBALL, J. - not on panel.

FILED
DEC 7 1994
OFFICE OF THE CLERK

No. 93-1125

In The

Supreme Court of the United States

October Term, 1993

O. WILLIAM REEDER, JR.,

Petitioner,

versus

THE SUCCESSION OF MICHAEL B. PALMER, LYNN PAUL MARTIN, Individually and d/b/a LPM ENTERPRISES and BANK OF LaPLACE,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

THE SUCCESSION OF MICHAEL B. PALMER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ELLIS B. MUROV
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, Louisiana 70130
Phone: 504-581-5141
Attorneys for Succession of Michael B. Palmer, Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does Dr. Reeder satisfy, as a basis for jurisdiction, any of the three factors set forth in Supreme Court Rule 10.1?

2. Is the unanimous decision by the Louisiana Supreme Court manifestly incorrect?

LIST OF PARTIES

O. WILLIAM REEDER, JR.

SUCCESSION OF MICHAEL B. PALMER

LYNN PAUL MARTIN

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

RESPONDENT'S BRIEF 1

I. DR. REEDER'S PETITION FAILS TO ASSERT A BASIS FOR SUPREME COURT JURISDICTION UNDER SUPREME COURT RULE 10 2

II. THE UNANIMOUS DECISION BY THE LOUISIANA SUPREME COURT REPRESENTS A THOUGHTFUL AND MANIFESTLY CORRECT APPLICATION OF LAW WHEN A PARTY, SUCH AS DR. REEDER, CHOOSES TO SPLIT CAUSES OF ACTION 3

A. BACKGROUND 3

1. RELEVANT PROCEDURAL FACTS 3

2. FACTUAL BACKGROUND 7

B. LEGAL CONCLUSIONS AND HOLDINGS THAT ARE INDISPUTABLY CORRECT AND THAT DR. REEDER DOES NOT DIRECTLY CHALLENGE 8

C. THE LOUISIANA SUPREME COURT'S UNANIMOUS REJECTION OF DR. REEDER'S OBLIQUE ATTACK WAS MANIFESTLY CORRECT 9

TABLE OF CONTENTS – Continued

Page

1. DR. REEDER OBLIQUELY ATTACKS THE APPLICABILITY OF THE FEDERAL DOCTRINE OF *RES JUDICATA* 9

2. THE LOUISIANA SUPREME COURT'S UNANIMOUS DECISION CORRECTLY DETERMINED THAT THE ISSUE BEFORE IT REQUIRED IT TO ANALYZE AND THEN APPLY PRECLUSION PRINCIPLES WHERE A PARTY DECIDES TO SPLIT HIS CAUSES OF ACTION 12

III. CONCLUSION 15

APPENDIX:

A – Excerpts from Dr. Reeder's Petition to the Louisiana Supreme Court A1

B – Excerpts from the Succession's Petition to the Louisiana Supreme Court A9

TABLE OF AUTHORITIES

Page

CASES

Bennett v. United States Trust Co. of New York, 770 F.2d 308 (2nd Cir. 1985), *cert. denied*, 474 U.S. 1058, 106 S.Ct. 800, 88 L.Ed.2d 776 (1986) 15

Cannon v. Loyola University of Chicago, 784 F.2d 777 (7th Cir. 1986) 8

Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988) 11

Clark v. Haas Group, Inc., 953 F.2d 1235 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 98 (1992) 8

Dowd v. Society of St. Columbans, 861 F.2d 761 (1st Cir. 1988) 8

Federated Department Stores v. Moitie, 452 U.S. 394, 101 S.Ct. 2424 (1981) 8

Fleming v. Travenol Laboratories, Inc., 707 F.2d 829 (5th Cir. 1983) 9

Fust v. Fontenelle, 558 So. 2d 715 (La.App. 4th Cir. 1990) 8

Gelb v. Royal Globe Insurance Co., 798 F.2d 38 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987) 8

Guidry v. Bank of LaPlace, 954 F.2d 278 (5th Cir. 1992) 12

Guidry v. Bank of LaPlace, 740 F. Supp. 1208 (E.D. La. 1990), *affirmed in part and modified in part*, 954 F.2d 278 (5th Cir. 1992) 13, 14

Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295 (5th Cir. 1983) 15

TABLE OF AUTHORITIES – Continued

Page

Mackey v. Pioneer National Bank, 867 F.2d 520 (9th Cir. 1989) 11

Matter of Howe, 913 F.2d 1138 (5th Cir. 1990) 8

Nilsen v. City of Moss Point, 701 F.2d 556 (5th Cir. 1983) 8

O'Connell v. Economic Research Analysts, Inc., 499 F.2d 994 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975) 14, 15

Reeder v. Succession of Palmer, 736 F. Supp. 128 (E.D. La. 1990), *affd per curiam*, 917 F.2d 560 (5th Cir. 1990) ..... *passim*

Rosado v. Wyman, 397 U.S. 397 (1970) 11

Stoll v. Gottlieb, 305 U.S. 165 (1938) 8

Transource International, Inc. v. Trinity Industries, Inc., 725 F.2d 274 (5th Cir. 1984) 14

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) 10, 11

STATUTES

Fed. R. Civ. Pro. 12(b)(6) 8, 12

La. R.S. 13:4231 5

MISCELLANEOUS

Restatement (Second) of Judgments at §§ 24-25 12

Wright, Miller & Cooper, Federal Practice and Procedure § 3567.1 at 133-36 and 136 n.20 (1984 and Supp. 1991) 14

No. 93-1125

In The

Supreme Court of the United States

October Term, 1993

O. WILLIAM REEDER, JR.,

Petitioner,

versus

THE SUCCESSION OF MICHAEL B. PALMER, LYNN PAUL MARTIN, Individually and d/b/a LPM ENTERPRISES and BANK OF LaPLACE,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

THE SUCCESSION OF MICHAEL B. PALMER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE COURT OF THE UNITED STATES:

The Succession of Michael B. Palmer ("Succession") respectfully submits that Dr. O. William Reeder, Jr.'s ("Dr. Reeder") Petition for Writ of Certiorari should be denied for two reasons: First, the Petition does not allege, as a basis for jurisdiction, any of the three factors set forth in Supreme Court Rule 10.1. Second, the unanimous decision by the Supreme Court of the State of Louisiana is manifestly correct; not manifestly incorrect.

The Succession finally asks that the Court impose all costs and fees that it legitimately can upon Dr. Reeder.

I. DR. REEDER'S PETITION FAILS TO ASSERT A BASIS FOR SUPREME COURT JURISDICTION UNDER SUPREME COURT RULE 10

According to Supreme Court Rule 10, this Court only grants petitions for certiorari based upon "judicial discretion," and "only when there are special and important reasons therefor." Rule 10.1 then sets forth three situations where this Court will consider using its discretion in deciding whether to grant a Writ of Certiorari. Dr. Reeder's Petition does not invoke any of those three criteria.

Specifically, Dr. Reeder's Petition asserts, as a jurisdictional basis, that the unanimous decision of the Louisiana Supreme Court constitutes a manifestly erroneous interpretation of federal law. Dr. Reeder does not contend that the Louisiana Supreme Court decision is in conflict with another state supreme court decision or a United States appellate court decision. Dr. Reeder does not contend that the decision constitutes an important question of federal law which has not been but should be settled by this Court.[1] The Petition, therefore, should be denied without further analysis.

Rule 10.1, however, does not expressly set forth an exclusive listing of reasons that will be considered by this

---

[1] The criteria set forth in Rule 10.1(a) is obviously inapplicable.

Court in deciding whether to grant a Petition for Certiorari. The Succession, accordingly, addresses below the contention that the decision by the Louisiana Supreme Court is manifestly erroneous.

II. THE UNANIMOUS DECISION BY THE LOUISIANA SUPREME COURT REPRESENTS A THOUGHTFUL AND MANIFESTLY CORRECT APPLICATION OF LAW WHEN A PARTY, SUCH AS DR. REEDER, CHOOSES TO SPLIT CAUSES OF ACTION.

A. *Background.*

1. Relevant procedural facts.

On July 10, 1989, Dr. Reeder filed a Complaint in federal court alleging violation of the Securities Act of 1933, the Securities Act of 1934, and Louisiana's Blue Sky law.[2] In October 1989, Judge Robert F. Collins granted the Succession's and the Bank of LaPlace's motion to dismiss. Judge Collins' written decision in *Reeder I* is dated May 2, 1990.[3]

On the same day that Dr. Reeder appealed, he filed an original Petition in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana.[4] His counsel, however, chose not to serve it.

---

[2] The federal court complaint and/or decision(s) are sometimes referred to herein as *Reeder I*.

[3] See *Reeder v. Succession of Palmer*, 736 F.Supp. 128 (E.D. La. 1990), *affd per curiam*, 917 F.2d 560 (5th Cir. 1990).

[4] The state court petition and/or decision(s) are sometimes referred to herein as *Reeder II*.

After the Fifth Circuit Court of Appeals affirmed *per curiam* the dismissal of *Reeder I* and denied rehearing, Dr. Reeder amended the *Reeder II* petition. The factual allegations in *Reeder II*, however, remained virtually identical to the factual allegations contained in *Reeder I*.

Dr. Reeder then served the amended petition on the Succession and Bank of LaPlace only. Dr. Reeder's amended Petition asserted:

1. Violation of Louisiana's Blue Sky law;
2. Violation of the Unfair and Deceptive Trade Practices Act;
3. Negligence and breach of fiduciary duty "by failing to discover and prevent [Lynn Paul Martin's] fraudulent scheme from operating . . . "; and
4. Breach of contract.

The Succession and Bank of LaPlace then filed dispositive motions. The district court dismissed *Reeder II* concluding that the allegations contained in the amended petition failed to state a cause of action and/or were barred by the doctrine of *res judicata*.

Dr. Reeder appealed. Dr. Reeder, however, did not appeal the dismissal of the Bank of LaPlace.

On appeal, the Louisiana State Fifth Circuit Court of Appeals applied Louisiana's rule of *res judicata* in effect at the time,[5] rather than the federal rule of *res judicata*. The

---

[5] See La. R.S. 13:4231 printed at A-11 of Dr. Reeder's Petition.

state Fifth Circuit concluded that the doctrine of *res judicata* barred only the Blue Sky law claim.

The state Fifth Circuit then held that the remaining claims, except the breach of contract claim, were either prescribed or perempted. The breach of contract claim failed to state a cause of action, according to the state appellate court, because it specifically identified the late Michael B. Palmer as an agent of Lynn Paul Martin.[6] Agents of disclosed principals, of course, cannot be held liable for the principal's breach of contract.[7] The state appellate court, with one dissenting judge, nevertheless, ruled that Dr. Reeder should be allowed to amend his petition to see if he could state a breach of contract claim.[8]

Dr. Reeder and the Succession then sought rehearing. The state Fifth Circuit denied both petitions for rehearing. Both parties sought review by the Louisiana Supreme Court.[9]

The Succession sought review because the Fifth Circuit Court of Appeals applied Louisiana, rather than the federal, law of *res judicata*.[10] Since the judgment was a

---

[6] See Dr. Reeder's Petition at A-15.

[7] *Id.*

[8] See Dr. Reeder's Petition at A-14 thru A-18.

[9] Dr. Reeder claimed that certain claims were not prescribed in his Writ Application to the Louisiana Supreme Court. See Appendix A, which constitutes relevant portions of Dr. Reeder's Petition to the Louisiana Supreme Court.

[10] See Appendix B, which represents relevant portions of the Succession's Petition to the Louisiana Supreme Court.

federal judgment based upon federal question jurisdiction, the Succession contended that the federal rule of *res judicata* rather than Louisiana rule of *res judicata* should have been applied.[11] The Succession, alternatively, contended that its Petition should be granted since Dr. Reeder could not possibly amend his Petition so as to state a claim against Palmer for breach of contract, since his petition openly claimed (and correctly so) that Palmer was an agent of a disclosed principal.[12]

The Louisiana Supreme Court subsequently ruled that the doctrine of *res judicata*, as applied to a plaintiff who split claims, barred all of the *Reeder II* allegations.[13] After Dr. Reeder's application for rehearing was denied, he filed this Petition.

Dr. Reeder's Petition herein is virtually identical to Dr. Reeder's Application for Rehearing, which was unanimously denied by the Louisiana Supreme Court on October 7.

Dr. Reeder's Petition herein does not contest the dismissal of his Blue Sky Law claim, negligence or breach of fiduciary duty claims. Dr. Reeder's Petition, accordingly, in reality asks this Court only to allow him to amend his Petition in order to try to state a breach of contract claim under Louisiana law.

---

[11] See Appendix B.

[12] See Appendix B.

[13] See Dr. Reeder's Petition at A-20 thru 36.

2. *Factual Background.*

The factual allegations in *Reeder I* and *Reeder II* are virtually identical.[14] In brief, Dr. Reeder alleged that Lynn Paul Martin, acting through other agents and representatives, such as Palmer, fraudulently induced persons to invest in his travel club.

Martin's scheme involved obtaining loans from individuals, such as the late Michael B. Palmer and Dr. Reeder, to purchase airline tickets in order to provide transportation to Las Vegas for various gamblers. Martin promised to repay all the monies, plus pay interest at the rate of 6% per month on the monies. Dr. Reeder then allegedly provided monies from October 13, 1986 through October 10, 1988. In all, he loaned $254,000 and received in return $68,400 for a total loss of about $185,600.

In April of 1988, Martin approached federal authorities and confessed to operation of a ponzi scheme. Michael B. Palmer committed suicide on May 8, 1988.[15] In the summer of 1988, Martin was sentenced and sent to federal prison.[16]

---

[14] See Dr. Reeder's Petition at A-23.

[15] At the time of his death, Martin owed Palmer $671,856.

[16] Martin, who has never been served with either the *Reeder I* or *Reeder II* pleadings, was released from prison in 1993 and, on information and belief, currently lives in posh surroundings in Florida.

B. Legal Conclusions and Holdings That Are Indisputably Correct and That Dr. Reeder Does Not Directly Challenge.

The state Fifth Circuit Court of Appeals' decision[17] held that *res judicata* only barred the Louisiana Blue Sky law claim. At the time, Louisiana law could have been properly construed to reach that result.

The decision in *Reeder I* arose out of the *Reeder I* court's federal question jurisdiction.[18] The federal law of *res judicata*, therefore, applies.[19]

The federal law of *res judicata* bars all claims arising out of the same occurrence or transaction, regardless of whether those claims were asserted or not asserted.[20]

---

[17] See Dr. Reeder's Petition at A-3 through A-18.

[18] For *res judicata* purposes, a dismissal under Fed. R. Civ. Pro. 12(b)(6) (failure to state a claim upon which relief may be granted) is a judgment on the merits. *Federated Dept. Stores v. Moitie*, 452 U.S. 394, 398-99, 101 S.Ct. 2424, 2428 (1981). *See also Fust v. Fontenelle*, 558 So. 2d 715, 717 (La.App. 4th Cir. 1990). The same is true for summary judgment (Fed. R. Civ. Pro. 56). *E.g., Dowd v. Society of St. Columbans*, 861 F.2d 761, 764 (1st Cir. 1988).

[19] *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 41-42 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987), and cases cited therein, including, but not limited to, *Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938).

[20] *Matter of Howe*, 913 F.2d 1138, 1143-44 n.10 (5th Cir. 1990) (lender liability action barred by prior bankruptcy action); *Nilsen v. City of Moss Point*, 701 F.2d 556, 560 (5th Cir. 1983) ("*res judicata* . . . bars all claims that could have been advanced . . . "); *Clark v. Haas Group, Inc.*, 953 F.2d 1235 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 98 (1992) (dismissal of Fair Labor Standards Act suit for unpaid overtime barred subsequent Age Discrimination in Employment and Equal Pay Act claims); *Cannon v. Loyola*

The factual allegations in the *Reeder I* complaint and the *Reeder II* petition are virtually identical. The decision in *Reeder I*, accordingly, barred all the claims arising out of those allegations regardless of the fact that they were not asserted in *Reeder I*.[21]

Dr. Reeder does not directly challenge that application of the federal doctrine of *res judicata* would bar all of the *Reeder II* claims that were or that could have been asserted based on the factual allegations in the *Reeder I* complaint.

C. The Louisiana Supreme Court's Unanimous Rejection of Dr. Reeder's Oblique Attack Was Manifestly Correct.

1. Dr. Reeder obliquely attacks the applicability of the federal doctrine of *res judicata*.

Dr. Reeder obliquely attacks the applicability of the doctrine of *res judicata*. He argues that, even if the additional claims asserted in *Reeder II* had been asserted in *Reeder I*, the federal district court would have been required, absent extraordinary circumstances, to dismiss those allegations without ruling on the merits thereof. Dr. Reeder thus contends that while the federal law of *res*

University of Chicago, 784 F.2d 777 (7th Cir. 1986) (breach of contract claim barred by prior dismissal of Title IX claim); *Fleming v. Travenol Laboratories, Inc.*, 707 F.2d 829 (5th Cir. 1983) (sex discrimination suit barred by prior dismissal of race discrimination claim).

[21] *Id.*

judicata would, if applied, bar the *Reeder II* claims based on the same factual allegations, the federal law of *res judicata* should not have been applied.

Dr. Reeder has not yet cited one case that directly supports his argument based on even remotely similar facts to those herein and for good reason. None exists.

Dr. Reeder's argument is based on a very unsound foundation. Specifically, Dr. Reeder contends that this Court's decision in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), does not vest discretion with the district judge for purposes of deciding to retain or not retain a pendent claim. Rather, according to Dr. Reeder, a district judge lacks discretion to exercise pendent jurisdiction over state law claims after dismissal of federal claims, in the absence of extraordinary circumstances.

Gibbs, however, vests district courts with discretion and does not require the existence of extraordinary circumstances in order to exercise said discretion in favor of retention of pendent claims. Specifically, this Court said:

> It has been consistently recognized that pendent jurisdiction is a doctrine of *discretion* . . . Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should *hesitate* to exercise jurisdiction over state claims . . . Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims *should* be dismissed as well. Similarly, if it appears that the state issues substantially predominate . . . the state claim *may* be dismissed without prejudice . . . (Emphasis added).

383 U.S. at 726.

Moreover, *Gibbs* has been subsequently construed by this Court in a fashion that is inconsistent with the position urged by Dr. Reeder herein. Specifically, in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), this Court spoke of the "distinction between the power of federal courts to hear state law claims and the *discretionary* exercise of that power." 484 U.S. at 349 (emphasis added). The *Carnegie-Mellon* Court then added that the discretion should be exercised by weighing "the values of judicial economy, convenience, fairness and comity . . . As articulated by *Gibbs*, the doctrine of pendent jurisdiction thus is a doctrine of *flexibility*, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values." 484 U.S. at 350 (emphasis added). See also, *Rosado v. Wyman*, 397 U.S. 397, 404-05 (1970) (Court *rejects* contention "that once a federal court loses power over the jurisdiction conferring claim, it may not consider a pendent claim . . . We are not willing to defeat the common sense policy of pendent jurisdiction – the conservation of judicial energy and the avoidance of multiplicity of litigation – by a conceptual approach that would require jurisdiction over the primary claim at all stages . . . ").

Lower courts, accordingly, have not looked for extraordinary circumstances, but, rather, exercised discretion based on the guidelines provided by this Court in determining whether to exercise pendent jurisdiction. See, *e.g.*, *Mackey v. Pioneer National Bank*, 867 F.2d 520, 523 (9th Cir. 1989) (retention of jurisdiction and resolution of state law claims after dismissal of federal claims held to the proper exercise of discretion, even though case had been in the federal system for only four (4) months, since

"retention of jurisdiction well served the purposes of judicial economy and efficiency"); and *Guidry v. Bank of LaPlace*, 954 F.2d 278, 285-86 (5th Cir. 1992) (court rejects argument that district court should have declined to exercise pendent jurisdiction after dismissing federal claims pursuant to Fed.R.Civ.Pro. 12(b)(6) in the early stages of the proceeding).

2. The Louisiana Supreme Court's unanimous decision correctly determined that the issue before it required it to analyze and then apply preclusion principles where a party decides to split his causes of action.

The Louisiana Supreme Court clearly understood Dr. Reeder's contention because it did not completely adopt the arguments raised by the Succession. That is, the Succession argued that the federal law of *res judicata* required the *Reeder II* courts to dismiss all claims that arose out of the same facts that were asserted in the *Reeder I* complaint, period.

The Louisiana Supreme Court, however, did not solely rest its holding on the general application of the federal law of *res judicata*. Rather, the Louisiana Supreme Court searched for authorities dealing with the application or nonapplication of *res judicata* where a party splits his claims. The Restatement (Second) of Judgments directly addresses said fact scenario at §§ 24 and 25.

The authority relied upon by the Louisiana Supreme Court (See Restatement (Second) of Judgments at §§ 24-25) calls for the application of the doctrine of *res judicata* unless the first court either lacked jurisdiction

over the omitted claims or having jurisdiction would clearly have declined to exercise it as a matter of discretion.[22]

The United States District Court for the Eastern District of Louisiana clearly had jurisdiction. The only issue, therefore, is whether it would have clearly declined to exercise it in its discretion if Dr. Reeder had presented all of his claims.

The Louisiana Supreme Court correctly determined that Judge Collins would not have clearly declined to exercise jurisdiction as a matter of discretion for two indisputable reasons. First, he chose to exercise pendent jurisdiction over Dr. Reeder's Blue Sky law claim. See *Reeder v. Succession of Palmer*, 736 F.Supp. 128 (E.D. La. 1990), *aff'd per curiam*, 917 F.2d 560 (5th Cir. 1990). Second, in another case involving the same ponzi scheme where, rather than splitting causes of action, the plaintiff asserted both federal and all of his pendent claims in federal court, Judge Collins, and on review the federal Fifth Circuit Court of Appeal, exercised jurisdiction over all of the pendent claims. See *Guidry v. Bank of LaPlace*, 740 F.Supp. 1208 (E.D. La. 1990), *affirmed in part and modified in part*, 954 F.2d 278 (5th Cir. 1992).

There the Federal Fifth Circuit, contrary to the position espoused by Dr. Reeder herein, affirmed dismissal with prejudice of all federal claims and several state law claims, including some negligence claims, based on the

---

[22] See Dr. Reeder's Petition at A-26 thru A-36.

absence of a duty to protect third parties from the criminal conduct of another. The *Guidry* panel, however, modified the decision below so as to dismiss without prejudice several claims, including fraud and negligent misrepresentation, because the *Guidry* panel concluded that Mr. Guidry might be able to amend to state a claim.

The *Guidry* panel certainly did not refuse to exercise jurisdiction over the pendent claims, as it dismissed some with prejudice and would have dismissed all the pendent claims with prejudice, except for its conclusion that plaintiff might be able to amend to state a cause of action. Thus, the *Guidry* decision dispositively rejects Dr. Reeder's argument that, assuming his negligence, breach of fiduciary duty and breach of contract claims had been asserted, they would have been dismissed without prejudice.

The *Guidry* decision is not an anomaly. Federal district and appeals courts have not consistently dismissed all pendent state claims when the federal claims were dismissed prior to trial. A leading treatise cites eighteen federal cases in which state claims were retained and decided even though the federal claim was dismissed before trial, and additional federal cases recognizing that dismissal of state claims is not automatic merely because the federal claims are dismissed before trial. 13B Wright, Miller & Cooper, *Federal Practice and Procedure* § 3567.1 at 133-36 and 136 n.20 (1984 and Supp. 1991). See also, *e.g. Transource International, Inc. v. Trinity Industries, Inc.*, 725 F.2d 274, 285 (5th Cir. 1984) (exercise of pendent jurisdiction over state law claims proper even after the federal district court had eliminated the federal antitrust claims by summary judgment); *O'Connell v. Economic Research Analysts, Inc.*, 499 F.2d 994, 996 (5th Cir. 1974) (dismissal of

claim under the Securities Exchange Act of 1934, because defendants were not "controlling persons" under the Act, not followed by remand to state court but rather remand to federal district court for exercise of discretion as to whether to hear state law fraud claim), *cert. denied*, 419 U.S. 1122 (1975); *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1317-20 (5th Cir. 1983) (bar to federal cause of action based on releases did not preclude court from then reaching the merits of plaintiff's state law claims); *Bennett v. United States Trust Co. of New York*, 770 F.2d 308 (2nd Cir. 1985) (affirming dismissal of claims under Securities Exchange Act of 1934 and state common law fraud, *inter alia*, for failure to state a cause of action), *cert. denied*, 474 U.S. 1058, 106 S.Ct. 800, 88 L.Ed. 2d 776 (1986).

III. CONCLUSION

Dr. Reeder's Petition should be denied.

The Succession is not money-laden, and the assets of the Succession should go to Mr. Palmer's heirs and not attorneys. In order to replenish some of the Succession's assets, so that said monies can go to the heirs, the Succession prays for an Order imposing all fees and costs that this Court can legitimately impose on Dr. Reeder and his counsel.

Respectfully submitted,

ELLIS B. MUROV (9839)
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, LA 70130
Telephone: (504) 581-5141
Attorneys For Succession of Michael B. Palmer

APPENDIX A

SUPREME COURT FOR LOUISIANA

NUMBER: _____

O. WILLIAM REEDER, JR.

Plaintiff/Appellee

VERSUS

THE SUCCESSION OF MICHAEL B. PALMER, LYNN PAUL MARTIN, INDIVIDUALLY AND D/B/A LPM ENTERPRISES AND BANK OF LAPLACE

Defendants/Appellant

APPLICATION FOR WRIT OF CERTIORARI OR REVIEW TO THE COURT OF APPEAL, FIFTH CIRCUIT, STATE OF LOUISIANA

DAVID L. COLVIN & ASSOCIATES
A Professional Law Corporation

/s/ Bruce A. North,
Bruce A. North, #10072
Of Counsel
1100 Fourth Street
Gretna, Louisiana 70053
(504) 367-9001

Attorney for Plaintiff/Appellee

INDEX

1.) Introduction ii

2.) Statement of Case 1

2.) Assignment of Errors 2

4.) Argument 3-4

5.) Conclusion 4

6.) Attachments

a) Verification of Counsel 5

b) Original Petition 6-12

c) First Supplemental and Amending Petition ..13-15

d) Exceptions of Res Judicata, Peremption [sic], No Cause of Action and Prescription ..16-30

e) Memorandum in Opposition to the Succession of Michael B. Palmer's Exceptions. 31-52

f) Judgment of Trial Court 53

g) Appellant's Brief to Appellate Court 54-83

h) Appellee's Brief to Appellate Court 84-129

i) Appellant's Supplemental Brief to Appellate Court 130-132

j) Appellee's Supplemental Brief to Appellate Court 133-149

k) Appellate Court Opinion..... 150-162

l) Appellant's Application for Partial Rehearing 163-183

m) Appellee's Application for Partial Rehearing 184-200

n) Notice of Denial of Rehearing 201

INTRODUCTION

This case raises a single issue for review:

1. Whether timely filing of a Proof of Claim, pursuant to La. C.C.P. Arts 3241, et. seq., in a pending succession proceeding, suspends the running of prescription on that claim.

This issue was raised in the trial court by way of an exception of prescription filed on behalf of the Succession of Michael B. Palmer. The matter was briefed by both parties. The trial court failed to rule on the exception. The appellate court, noting that the exception was not the basis of the dismissal because of the trial court's failure to rule, considered the exception to still be before the Court. Notwithstanding the fact that a formal proof of claim had been served on both the succession representative and the attorney for the succession in July of 1988, the appellate court held the delictual claims to be prescribed.

STATEMENT OF THE CASE

On May 10, 1990, O. William Reeder (Reeder) filed his original petition in the 24th Judicial District Court. Exhibit B. Thereafter, Reeder filed his First Supplemental and Amending Petition on January 28, 1991. Exhibit C. In response thereto, the Succession of Michael B. Palmer (Palmer) filed exceptions of Res Judicata, Peremption [sic], No Cause of Action and Prescription. Exhibit D. The exceptions were tried on April 24, 1991. Thereafter, on April 26, 1991, the trial court entered judgment maintaining Palmer's exceptions of No Cause of Action and Res Judicata. Reeder's claims were dismissed with prejudice. Exhibit F. The trial court did not address the exception of

prescription which had been raised by Palmer and briefed by both parties. Exhibits D and E.

Reeder timely appealed the dismissal of his claims to the Court of Appeal, Fifth Circuit, State of Louisiana. The matter was duly briefed by the parties. Exhibits G and H. The Court of Appeal then requested additional briefs on the issue of whether the trial court should have given Reeder an opportunity to amend his pleadings. In response to this request the parties filed supplemental briefs. Exhibits I and J. On September 16, 1992 a five judge panel of the Fifth Circuit rendered judgment affirming in part, annulling in part and remanding the matter to the trial court for further proceedings. Exhibit K. The parties timely applied for partial rehearings. Exhibits L and M. Reeder's request was refused on October 19, 1992. Exhibit N.

The matter now comes before this Court on an Application for a Writ of Certiorari or Review, to review the decision of the appellate court.

ASSIGNMENT OF ERROR

1. The appellate court erred in maintaining Palmer's exception of prescription as to Reeder's delictual claims even though Reeder had timely filed a written Proof of Claim in the Succession of Michael B. Palmer, No. 363-621, 24th Judicial District Court for the Parish of Jefferson, and served said Proof of Claim by certified mail, under cover dated July 29, 1988, upon both the attorney of record for the succession and the succession representative, all in accordance with La. C.C.P. Arts.

3241, et. seq., thereby suspending the running of prescription on Reeder's delictual claims. This manifestly erroneous interpretation of La. C.C.P. Arts. 3241, et. seq. will cause Reeder material injustice if permitted to stand.

ARGUMENT

1. Reeder's *Proof of Claim*, made pursuant to La. C.C.P. Arts. 3245, et seq., suspended the running of prescription on his delictual claims against the Succession of Michael B. Palmer.

It is difficult to imagine a more clear and simple statement of the law than that found in La. C.C.P. Art. 3245 which provides, in part, as follows:

> A) A creditor may suspend the running of prescription against his claim by delivering personally or by certified or registered mail to the succession representative, or his attorney of record, a formal written proof of claim. . . .
>
> B) Such proof of claim shall be sworn to by the claimant and shall set forth:
>
> (1) The name and address of the creditor;
>
> (2) The amount of the claim, and a short statement of facts on which it is based; and
>
> (3) If the claim is secured, a description of the security and of any property affected thereby. . . .
>
> C) The submission of this formal proof of claim, even though it be rejected subsequently by the succession representative, shall suspend the running of prescription

> against the claim as long as the succession is under administration. . . .

In the instant case, Reeder filed a Proof of Claim in accordance with La.C.C.P. Article 3245 and directed that Proof of Claim to the attorney for the succession as noted in the succession pleadings, namely, Paul C. Pepitone. A copy of the claim is found in the original record at pages 127-139 and was made part of Reeder's opposition to the Exception of Prescription filed in the trial court. The claim was rejected by both the executrix and the attorney for the succession. Copies of these letters of rejection are found in the original record at pages 123 and 124 and are also part of Reeder's opposition to the Exception of Prescription. Exhibit E. Rejection of the claims was a prerequisite to judicial enforcement. La.C.C.P. Article 3246. The "Succession of Michael B. Palmer", No. 363-621, 24th Judicial District Court for the Parish of Jefferson remains under administration at the present time. This Court can take judicial notice of that fact. All of these facts were completely ignored by the Appellate Court. Additionally, it is the "succession" and not "heirs" of Michael B. Palmer that is a party in these proceedings. This clearly indicates that the succession remains under administration. Thus, pursuant to La.C.C.P. Article 3245, prescription against Reeder's claims remains suspended. See, *Smith v. Anderson*, 563 So.2d 380 (1st Cir. 1990) (Writ Denied Oct. 5, 1990).

CONCLUSION

The judgment of the Appellate Court holding Reeder's claims to be barred by prescription of one year is clearly wrong and should be reversed.

Respectfully submitted;

DAVID L. COLVIN & ASSOCIATES
A Professional Law Corporation

/s/ Bruce A. North
Bruce A. North, Of Counsel
Louisiana Bar No. 10072
Attorney for Plaintiff/Appellee
1100 Fourth Street
Gretna, Louisiana 70053
Phone: (504) 367-9001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been duly served upon all counsel of record, by placing same in the United States Mail, postage prepaid, this 13th day of November, 1992.

/s/ Bruce A. North

PLAINTIFF'S EXHIBIT A

VERIFICATION

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned Notary, personally appeared:

BRUCE A. NORTH

who was sworn and who declared that he is the counsel for O. William Reeder, Jr., plaintiff/appellant and petitioner in the foregoing application for writs; that he has prepared the foregoing application; that the factual allegations therein set forth are true and correct to the best of his knowledge, information and belief; and that a copy thereof has been served by mail on counsel for all parties herein and upon the Fifth Circuit Court of Appeal.

/s/ Bruce A. North
BRUCE A. NORTH

SWORN TO AND SUBSCRIBED before
me, Notary, this 13th day of
November, 1992.

/s/ David L. Colvin
NOTARY PUBLIC

APPENDIX B

92-C-3002

SUPREME COURT

STATE OF LOUISIANA

NO. 92-C-3002

O. WILLIAM REEDER, JR.,
Plaintiff/Appellant

VERSUS

THE SUCCESSION OF MICHAEL B. PALMER, LYNN PAUL MARTIN, INDIVIDUALLY and d/b/a LPM ENTERPRISES and BANK OF LaPLACE,
Defendants/Appellees

APPLICATION FOR WRIT OF CERTIORARI OR REVIEW FROM THE FIFTH CIRCUIT COURT OF APPEAL STATE OF LOUISIANA

Submitted By:

ROBERT E. KERRIGAN, JR. (7350)
ELLIS B. MUROV (8939)
JOHN F. WILLIS (19455)
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, LA 70130
Telephone: (504) 581-5141
Attorneys for Succession of
Michael B. Palmer

INDEX

Table of Cases iii

Statement of Writ Grant Considerations iv

Memorandum 1

I. Background 1

A. Statement of the Case 1

B. Factual Background 4

II. Assignment of Errors 5

III. Summary of Argument 5

IV. Argument 7

A. Principles Applicable to the Federal Law of *Res Judicata* 7

B. This Court Should Grant a Writ of Certiorari Or Review in Order to Address a Significant Unresolved Issue of Law 14

C. This Court Should Grant a Writ of Certiorari or Review Because the Decision of the Fifth Circuit Conflicts with Decisions of the Louisiana Supreme Court and Erroneously Interprets or "Applies" "the Intramural Federal Law" of *Res Judicata* and in So Doing Has Caused Material Injustice and Adversely Affected a Significant Public Interest 15

D. This Court Should Grant the Writ of Certiorari Or Review in Order to Correct the Conflict Between the Decision of the Fifth Circuit and This Court's Decision in *Preis v. Standard Coffee Co.* 17

Conclusion 18

Verification 23

Appendix - Exhibits

A. Dr. Reeder's Federal Court Complaint 24

B. The Federal Court decisions in *Reeder v. Succession of Michael B. Palmer,* 736 F.Supp. 128 (E.D. La. 1990), *aff'd. per curiam* and *rehearing denied per curiam,* 917 F.2d 560 (5th Cir. 1990) 37

C. Dr. Reeder's original State Court Petition 43

D. Dr. Reeder's State Court Amended Petition 50

E. State trial court Judgment 53

F. Order dated May 26, 1992 54

G. Supplemental Brief on behalf of W. William Reeder 55

H. Fifth Circuit Court of Appeal Order and Opinion 58

I. Fifth Circuit's Order denying of Petition for Rehearing 71

CASES

Anderson v. Phoenix Investment Counsel of Boston, Inc., 387 Mass. 444, 440 N.E.2d 1164 (1982) 14

Dowd v. Society of St. Columbans, 861 F.2d 761, 764 (1st Cir. 1988) 8

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 14

Federated Dept. Stores v. Moitie, 452 U.S. 394, 398-99, 101 S.Ct. 2424, 2428 (1981) 8, 16

Fust v. Fontenelle, 558 So.2d 715, 717 (La.App. 4th Cir. 1990) 8

Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 41-42 (2d Cir. 1986), *cert denied*, 480 U.S. 948 (1987) 14

Jeanes v. Henderson, 688 S.W.2d 100 (Tex. 1985) 14

Matter of Howe, 913 F.2d 1138 (5th Cir. 1990) ... 7, 8, 15

McNeal v. Paine, Webber, Jackson & Curtis, Inc., 249 Ga. 662, 293 S.E.2d 331 (1982) 13

Nilsen v. City of Moss Point, 701 F.2d 556 (5th Cir. 1983) 7, 8

Pilie & Pilie v. Metz, 547 So.2d 1305 (La. 1989) ..... iv, v, 6, 8, 14, 15, 16, 17

Preis v. Standard Coffee Service Co., 545 So.2d 1010 (La. 1989) ..... v, 5, 6, 17, 18

Reeder v. Succession of Michael B. Palmer, 736 F.Supp. 128 (E.D. La. 1990), *aff'd. per curiam* and *rehearing denied per curiam*, 917 F.2d 560 (5th Cir. 1990) ..... i, iv

Rennie v. Freeway Transport, 294 Or. 319, 656 P.2d 919 (1982) 14

Stoll v. Gottlieb, 305 U.S. 165, 170-71, 59 S.Ct. 134, 136-37, 83 L.Ed. 104 (1938) 14, 15

STATUTES

Fed. R. Civ. Pro. 12(b)(6) ..... iv, 8

Fed. R. Civ. Pro. 56 ..... iv, 8, 17

STATEMENT OF WRIT GRANT CONSIDERATIONS

Pursuant to Rule X, Section 1, the Succession of Michael B. Palmer ("Succession") submits that this Court should grant a writ of certiorari or review because:

1. The decision of the Fifth Circuit raises a significant issue of law which has not been, but which should be, resolved by this Court; and

2. The decision of the Fifth Circuit is in conflict with decisions of this Court;

3. The Fifth Circuit either erroneously interpreted or applied the doctrine of *res judicata*; and

4. The decision represents a departure from proper judicial proceedings.

While each of these factors will be addressed more fully in the argument, the Succession will briefly address them at this point. Specifically, at issue herein is whether the decision rendered in *Reeder v. Succession of Palmer*, 736 F.Supp. 128 (E.D. 1990), *aff'd. per curium*, 917 F.2d 560 (5th Cir. 1990); *rehearing denied per curium*, 917 F.2d 560 (5th Cir. 1992),[1] bars the litigation filed in the 24th Judicial District Court for the Parish of Jefferson,[2] where *Reeder I* followed the filing of dispositive motions pursuant to Rule 12(b)(6) and 56 of the Federal Rules of Civil Procedure, and the factual allegations in *Reeder I* and *Reeder II* are virtually identical.

---

[1] Hereinafter referred to as *"Reeder I."*

[2] Hereinafter referred to as *"Reeder II."*

SIGNIFICANT UNRESOLVED ISSUES OF LAW. Unlike *Pilie & Pilie v. Metz*, 547 So.2d 1305 (La. 1989), the *Reeder I* Court had federal question jurisdiction. This distinction seems important, because this Court in *Pilie* suggested that the determination of which law was to be applied (federal) did not address what was the federal *res judicata* law to be applied in a diversity case. 547 So.2d at 1309-10. This Court in *Pilie*, however, did not answer that question because there was no distinction between "the intramural federal law and the law of New York (the state in which the diversity court sat) . . . " 547 So.2d at 1309-10. Since the present case involves a determination issued by the *Reeder I* Court pursuant to federal question jurisdiction, this Court should address what is the federal law of *res judicata* to be applied, i.e., Louisiana law or "the intramural federal law."

CONFLICTING DECISIONS. The decision of the Fifth Circuit conflicts with this Court's decisions in *Pilie, supra*, where this Court stated that "the intramural federal law" of *res judicata* barred subsequent claims (legal theories) where same arose "out of the same transaction as the claim or cause of action presented in the earlier proceedings;" and *Preis v. Standard Coffee Service Co.*, 545 So.2d 1010 (La. 1989), wherein this Court held that *res judicata* barred previously unasserted legal theories of recovery where same arose from the same juridical or material facts.

ERRONEOUS INTERPRETATION OR APPLICATION OF CONSTITUTION OR LAWS CAUSING MATERIAL INJUSTICE AND SIGNIFICANTLY AFFECTING PUBLIC INTEREST. The decision of the Fifth Circuit barred, pursuant to the doctrine of *res judicata*, only one

of Dr. Reeder's claims. Specifically, it barred Dr. Reeder's claims pursuant to Louisiana's Blue Sky Law. In so doing, the Fifth Circuit purported to, but clearly did not, apply "the intramural federal law" of *res judicata*, and erroneously interpreted or applied the rule of this Court as enunciated in *Preis v. Standard Coffee Service Co.*, 545 So.2d 1010 (La. 1989). In so doing, the Fifth Circuit caused material injustice, as it potentially forces one of Lynn Paul Martin's victims (the Succession) to continue to expend monies defending barred claims, and significantly and adversely affects the public interest, as represented by the doctrine of *res judicata*.

DEPARTURE FROM PROPER JUDICIAL PROCEEDINGS. See Conclusion.

* * *

The Petition in *Reeder II* was filed on **May 10, 1990**. Made Defendants were the Succession, Bank of LaPlace and Lynn Paul Martin. Martin, however, was never served and has never answered. He currently resides in a federal prison near Pensacola, Florida.

By this action, Dr. Reeder seeks to recover $185,600 from the Succession alone, as Dr. Reeder did not appeal dismissal of the Bank of LaPlace. Stated differently, Dr. Reeder solely seeks reimbursement from another of Martin's victims (Palmer – his Succession).

II. ASSIGNMENT OF ERRORS

A. The Fifth Circuit Generally Erred By Failing To Methodically Address Whether The Federal Or State Law Of *Res Judicata* Applied

And If It Determined That Federal Law Applied, Determining What The Applicable Federal Law Was.

B. The Fifth Circuit Specifically Erred By Not Determining That The Federal, Rather Than The State, Law Of *Res Judicata* Applied, Since The Federal Court Was Hearing The Action Pursuant To Its Federal Question, Rather Than Diversity, Jurisdiction.

C. The Fifth Circuit Glaringly Failed To Apply "The Intramural Federal Law" Of *Res Judicata* Which Bars Relitigation Of All Claims That Could Have Been Raised Arising Out Of The Same Operative Facts As In The Previous Litigation.

D. Even If Louisiana Law Of *Res Judicata* Applies, The Fifth Circuit Erred When It Did Not Follow The Principles Enunciated By This Court In *Preis v. Standard Coffee Service Co.*, 545 So.2d 1010 (La. 1989).

E. The Fifth Circuit Erred By Allowing Reeder To Attempt To Amend His Petition Again.

III. SUMMARY OF ARGUMENT

"The intramural federal law" of *res judicata* bars all claims or legal theories of recovery which Dr. Reeder raised or which Dr. Reeder could have raised, wherein said claims or legal theories of recovery arise out of the same nucleus of operative facts as set forth in the *Reeder I* complaint. Since the factual allegations in *Reeder I* and *Reeder II* are virtually identical, "the intramural federal law" of *res judicata* bars all such claims herein even

though Dr. Reeder did not assert some of those claims or legal theories of recovery in the *Reeder I* complaint.

Federal judgments should be accorded *res judicata* effect by state courts. While there may be some basis for discord as to what is the federal law of *res judicata* to be applied where the federal court sits pursuant to its diversity jurisdiction,[12] there should be no discord where the federal court is sitting pursuant to its federal question jurisdiction. Then the state court must unquestionably apply "the intramural federal law" of *res judicata.*

The Fifth Circuit's decision conflicts with this Court's decision in *Pilie, supra,* and/or erroneously interprets or applies "the intramural federal law" of *res judicata* because the decision failed to bar all claims asserted below that arise out of the same nucleus of operative facts as *Reeder I.*

Even if Louisiana law of *res judicata* applies, but it does not, the Fifth Circuit, nevertheless, erred and put itself in conflict with the principles enunciated in *Preis v. Standard Coffee Service Co.*, 545 So.2d 1010 (La. 1989), when it did not bar all claims arising out of the same juridical or material facts.

Dr. Reeder alleged that Palmer was the agent of a disclosed principal. The Fifth Circuit concluded that Dr. Reeder made that allegation and held that, as a matter of law, Palmer could not be liable for breach of contract since he was the agent of a disclosed principal. Both the finding and the conclusion are sound. Dr. Reeder, who

---

[12] The choice is between state law or "intramural federal law," as this Court coined that phrase in *Pilie.* 547 So.2d at 1309.

did not even oppose the *res judicata* exception in the trial court, should not be given leave to amend, since Dr. Reeder has already alleged that the loss he incurred resulted from a contract with Lynn Paul Martin, wherein the late Michael B. Palmer was the alleged agent of the disclosed principal (Martin). Stated differently, *res judicata* would bar any amended petition because Dr. Reeder would still be complaining about a loss arising from the same nucleus of operative facts as in *Reeder I*.

IV. ARGUMENT

A. Principles Applicable to "the IntraMural Federal Law" of *Res Judicata*.

"The intramural federal law" of *res judicata* requires that:

(1) The parties be identical in both suits;

(2) A court of competent jurisdiction rendered the prior judgment;

(3) There was a final judgment on the merits in the previous litigation; and

(4) The plaintiff raises the same cause of action or claim in both suits.

Matter of Howe, 913 F.2d 1138, 1144 (5th Cir. 1990).

"[I]t is black-letter law that *res judicata* . . . bars all claims that *could have been* advanced in support of the cause of action on the occasion of its former adjudication. . . . " *Nilsen v. City of Moss Point*, 701 F.2d 556, 560 (5th Cir. 1983) (emphasis in original). See also, *Matter of Howe*, 913 F.2d 1138, 1143-44 (5th Cir. 1990), which, in

pertinent part, also states that *res judicata* bars "all questions that could have been raised."

Whether two suits involve the same claim is determined, not by

> . . . the relief requested or the legal theory asserted but whether plaintiff bases the two actions on the same nucleus of operative facts.

Howe, supra at 1144. "A party may not avoid the preclusive effect of *res judicata* by asserting a new theory or a different remedy." *Matter of Howe*, 913 F.2d 1138, 1144 n.10 (5th Cir. 1990).

This Court reached a similar conclusion stating that "the intramural federal law" of *res judicata* bars:

> "remedies whether the party's right to those remedies was actually litigated in the earlier proceeding or not, if the later-asserted right is found to arise out of the same transaction as the claim or cause of action presented in the earlier proceeding."

Pilie & Pilie v. Metz, 547 So.2d 1305, 1310 (La. 1989). See also, *Nilsen*, 701 F.2d at 560.

The elements of federal *res judicata* are met here. In particular, the parties are identical in both the federal suit and the instant action; the federal court had competent jurisdiction; there was a final judgment on the merits in the previous decision;[13]

---

[13] For *res judicata* purposes, a dismissal under Fed. R. Civ. Pro. 12(b)(6) (failure to state a claim upon which relief may be granted) is a judgment on the merits. *Federated Dept. Stores v.*

and Dr. Reeder bases the two actions on the same nucleus of operative facts.[14]

That *Reeder I* and *Reeder II* involve the same nucleus of operative facts can be gleaned from a comparison of the Complaint and the Petition:

* * *

state court); *Rennie v. Freeway Transport*, 294 Or. 319, 656 P.2d 919 (1982) (federal judgment under Securities Exchange Act of 1934 barred fraud legal theories in state court); *Jeanes v. Henderson*, 688 S.W.2d 100 (Tex. 1985) (federal judgment under Securities Exchange Act of 1934 and state law legal theories barred declaratory judgment action in state court); and *Anderson v. Phoenix Investment Counsel of Boston, Inc.*, 387 Mass. 444, 440 N.E.2d 1164 (1982) (federal judgment under Investment Advisers Act of 1940 barred unfair and deceptive trade practices legal theories in state court).

B. This Court Should Grant a writ of Certiorari Or Review in Order to Address a Significant Unresolved Issue of Law.

In *Pilie & Pilie v. Metz, supra*, this Court reversed a decision by the First Circuit Court of Appeals for failing

---

Moitie, 452 U.S. 394, 398-99, 101 S.Ct. 2424, 2428 (1981). *See also Fust v. Fontenelle*, 558 So. 2d 715, 717 (La.App. 4th Cir. 1990). The same is true for summary judgment (Fed. R. Civ. Pro. 56). *E.g., Dowd v. Society of St. Columbans*, 861 F.2d 761, 764 (1st Cir. 1988).

[14] Another way of stating the final requirement is that the claims arise out of the same transaction or series of transactions. *Philie*, 547 So.2d at 1311.

to apply the federal law of *res judicata*. This Court in *Pilie*, however, distinguished the application of federal law and what was the federal law to be applied. In *Pilie, supra*, there was a previous judgment from a federal court, which heard the case pursuant to its diversity jurisdiction. Accordingly, with implicit reference to the *Erie* doctrine,[16] the choices were "the intramural federal law" of *res judicata* or the law of the state in which the federal court was sitting. This Court did not resolve that question or issue in *Pilie*, because federal law and New York law were identical.

The *Reeder I* court had federal question jurisdiction. "A state court must apply federal law to determine the preclusive effect of a prior federal question judgment." *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 41-42 (2d Cir. 1986), *cert denied*, 480 U.S. 948 (1987), and cases cited therein, including, but not limited to, *Stoll v. Gottlieb*, 305 U.S. 165, 170-71, 59 S.Ct. 134, 136-37, 83 L.Ed. 104 (1938).

This Court, accordingly, should grant the writ of certiorari or review in order to:

1. Declare that Louisiana courts must apply "the intramural federal law" of *res judicata* to prior federal question judgments; and then

2. Apply properly "the intramural federal law" of *res judicata* to the facts herein.

---

[16] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

C. This Court Should Grant a Writ of Certiorari or Review Because the Decision of the Fifth Circuit Conflicts with Decisions of the Louisiana Supreme Court and Erroneously Interprets or "Applies" "the Intramural Federal Law" of *Res Judicata* and in So Doing Has Caused Material Injustice and Adversely Affected a Significant Public Interest.

In *Pilie & Pilie v. Metz*, 547 So.2d 1305 (La. 1989), this Court held that the federal law of *res judicata*, as opposed to the state law of *res judicata*, had to be accorded a federal judgment. Similarly, the United States Supreme Court in *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938), held that a state court was bound to apply the federal doctrine of *res judicata* where there is a previous federal court judgment.

Whether two suits involved the same cause of action or claim is determined not by:

> . . . the relief requested or the legal theory asserted, but whether plaintiff bases the two actions on the same nucleus of operative facts.

Howe, supra at 1144. This Court held that "the intramural federal law" of *res judicata* bars:

> . . . remedies whether the party's right to those remedies was actually litigated in the early proceeding or not, if the later-asserted right is found to arise out of the same transaction as the claim or cause of action presented in the earlier proceeding.

Pilie & Pilie v. Metz, 547 So.2d 1305, 1310 (La. 1989).

In the present case, the Fifth Circuit Court of Appeals purported to apply federal law. See p. 6 of the Opinion (Exhibit H). At p. 6, the Fifth Circuit Court of Appeals even correctly quoted the requirements for *res judicata* under federal law. The Fifth Circuit's decision, however, conflicts with *Pilie, supra*, and the federal decisions cited therein, and erroneously applied or interpreted *Pilie* because it obviously did not apply the fourth element (plaintiff raises the same cause of action or claim in both suits).

The Fifth Circuit clearly put itself in conflict with *Pilie* and erred in holding that *res judicata* barred only Dr. Reeder's Blue Sky Law claim because "the intramural federal law" of *res judicata* bars all claims or legal theories of recovery arising out of the same nucleus of operative facts. A comparison of Exhibits A, C and D at pp. 9-13, *supra*, plainly shows that Dr. Reeder's negligence, breach of fiduciary duty and breach of contract claims arise out of the same nucleus of operative facts.

Besides being clearly erroneous, the Fifth Circuit's decision significantly and adversely affects the public interest, because it failed to apply *res judicata* which in and of itself embodies important public policy. According to the U.S. Supreme Court:

> The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*." (Citations omitted). The Court of Appeals'

> reliance on "public policy" is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." (Citations omitted). We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . . "

Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 402, 101 S.Ct. 2424, 2427 and 69 L.Ed.2d 103 (1981).

Finally, besides being clearly erroneous and significantly and adversely affecting the public interest, the decision will cause material injustice. The Succession will be forced to continue to defend and expend monies when it is quite obvious that any allegations in an amended petition will still be barred by the doctrine of *res judicata* because Dr. Reeder's losses are associated with Lynn Paul Martin's Travel Club.

This Court, accordingly, should grant a writ of certiorari or review in order to erase the conflict with *Pilie* and the federal cases cited therein, and correct the erroneous interpretations and application of "the intramural federal law" of *res judicata*.

D. This Court Should Grant the Writ of Certiorari Or Review in Order to Correct the Conflict Between the Decision of the Fifth Circuit and This Court's Decision in *Preis v. Standard Coffee Co.*

As one can see from the decision of the Fifth Circuit, it held that Louisiana law of *res judicata* in effect at the time of the filing of the lawsuit barred only Dr. Reeder's Blue Sky Law claim. Stated differently, the court held that *res judicata* would bar only a claim under Louisiana's Blue Sky Law because *Reeder I* alleged violation of Louisiana's Blue Sky Law and dismissed the same Blue Sky Law claim.

The Succession is aware that a court could reach the result reached below by applying Louisiana's law of *res judicata* prior to this Court's decision in *Preis v. Standard Coffee Service Co.*, 545 So.2d 1010 (La. 1989). The Succession, however, submits that the result reached below cannot be accorded with the principles announced in *Preis, supra.*

There, this Court considered whether Preis' unfair trade practices claim under La. R.S. 51:1401, *et seq.*, was barred by *res judicata*, based on his prior counterclaim alleging unlawful interference with his right to do business. Stated differently, **Preis did not assert an unfair and deceptive trade practices claim in his prior counterclaim.**

This Court, nevertheless, held that both actions were based on the same alleged misconduct or juridical or material facts, i.e., namely attempts to enforce an illegal nonsolicitation agreement. Therefore, even though the

unfair trade practices claim required different proof from the original counterclaim, and was not even asserted in the original counterclaim, the unfair and deceptive trade practices claim was barred by the doctrine of *res judicata*, since it arose out of the same juridical or material facts. 545 So.2d at 1013.

It is quite clear that the Complaint in *Reeder I* did not seek recovery pursuant to the legal theories of negligence, breach of fiduciary duty and breach of contract. Nevertheless, a review of the Complaint in *Reeder I* and the Petition, as amended, in *Reeder II* (compare Exhibits A, C and D, and/or see pp. 9-13, *supra*) reveals that both actions were based on the same juridical or material facts. Application of Louisiana's law of *res judicata*, accordingly, would bar also those allegations. *Preis, supra* at 1013.

CONCLUSION

As set forth above, it is quite clear that:

1. The Court in *Reeder I* had federal question jurisidiction;

2. The Court in *Reeder I* issued a judgment on the merits;

3. "The intramural federal law" of *res judicata* bars subsequent litigation of any claims or legal theories arising under the same nucleus of operative facts as set forth in previous litigation;

4. The legal theories asserted in *Reeder II*, such as negligence, breach of fiduciary duty and breach of contract, are barred because they arise out of the same nucleus of operative

facts as the allegations in *Reeder I*, and in fact, are virtually identical to the allegations in *Reeder I*;

5. The rule espoused by this Court in *Preis v. Standard Coffee Service Co., supra*, requires barring claims or legal theories raised in subsequent litigation where said claims or legal theories arise out of the same juridical or material facts as contained in prior litigation.

This Court, accordingly, should grant a writ of certiorari or review for reasons set forth above and hold that all of the claims in Dr. Reeder's Petition, as amended, are barred by the doctrine of *res judicata*.

The writ of certiorari or review, however, should go one step further. As one can see from the decision of the Fifth Circuit, the five-judge panel unanimously concluded that Palmer was the agent of a disclosed principal and, accordingly, not liable for breach of contract. Yet, by a 4-to-1 vote, the Court allowed Dr. Reeder the chance to amend his Petition in order to state, if he could, a breach of contract claim. Why?

It is frequently impossible to know what prompts or inspires a court to rule. While that is certainly true in this case, one can surmise that the language on p. 10 of the Opinion may have something to do with the decision. Specifically, at p. 10, the Court states:

> In reality, it defies logic and reason to say that, under the circumstances pointed out above, that Palmer did not know exactly the fraud that Martin was indulging in to the detriment of plaintiff as he allegedly personally

> helped Martin carry out the scheme and allegedly made many false representations to plaintiff himself. If these allegations are true, it shocks conscience and a sense of fairness if a man in Palmer's position cannot be held accountable for his actions. Plaintiff is entitled to a second chance to try to hold him accountable in contract through an amendment of his petition.

The above is not true! There is absolutely no basis in the record for such a statement. The public record, in fact, contains evidence that, by use of logic and reason, does not allow for such a conclusion.

Dr. Reeder's Petition, as amended, contains the following conclusory language:

> Palmer knew or should have known that the travel club scheme perpetrated by Martin was fraudulent in nature; further, Palmer owed a duty to plaintiff to discover and prevent the scheme from continuing to operate to plaintiff's and others' detriment. Palmer breached this special and fiduciary duty by failing to discover and prevent the fraudulent scheme from operating, thereby causing damage to plaintiff as aforesaid.

See Paragraph 26.

A fair reading of Paragraph 26 sets forth, with the exception of a naked and conclusory allegation of knowledge, allegations based on an absence of knowledge but a duty to acquire knowledge, and a failure to have acquired knowledge of Martin's fraudulent scheme. There is, accordingly, no basis for the language on p. 10 of the Opinion stating that it "defies logic and reasoning to

say . . . that Palmer did not know exactly the fraud that Martin was indulging in to the detriment of plaintiff . . . "

The public record, moreover, contains two entries that do not allow such a conclusion. Specifically,

1. As can be seen from the Answers filed by the Succession in other pending actions, Martin owed Palmer $671,856;

2. At Lynn Paul Martin's sentencing hearing, he was repeatedly asked whether anyone else was involved with him. The court was attempting to induce a yes answer, which would have resulted in a lesser sentence to Martin and pursuit of those in cahoots with him. Martin identified no one else.[17]

The Succession submits that it defies logic and reason to believe that Mike Palmer would knowingly assist and help Lynn Paul Martin defraud, among others, his neighbor, Dr. Reeder, through a ponzi scheme and, nevertheless, allow Mr. Martin to be indebted to him in the sum of $671,856. The Succession further submits that it defies logic and reason to believe that Lynn Paul Martin would identify no one as knowing of his scheme and knowingly assisting in his scheme where there was tremendous inducement for him to do the opposite. The Government has not pursued the Succession.

When the Fifth Circuit asked for briefs addressing solely the issue of whether Dr. Reeder should be allowed

---

[17] The statements set forth in No. 2 above were obtained from Martin's counsel, Lee Leonard and Eileen Shaver, Assistant U.S. Attorney, not from an independent review of the public records by the undersigned.

to amend his Petition to assert a claim for breach of contract, Dr. Reeder responded stating that "certainly, in the instant case, there is the conceivable possibility that the plaintiff can state a cause of action against the defendant." See Exhibit G. Dr. Reeder has already filed a Complaint, a Petition and Amended Petition. The three read virtually identical.

Given the fact that Palmer was an agent for a disclosed principal, and that the doctrine of *res judicata* bars any and all legal theories of recovery associated with Dr. Reeder's losses with Lynn Paul Martin's Travel Club, the Succession submits that Dr. Reeder cannot file an Amended Petition which would not be barred by the doctrine of *res judicata* or the doctrine that an agent for a disclosed principal was not liable for the principal's breach of contract.

This Court, accordingly, should also grant a writ based on a departure from proper judicial proceedings, and order that Dr. Reeder's Petition be finally dismissed with prejudice at this point and end this litigation.

/s/ Ellis B. Murov
ROBERT E. KERRIGAN, JR. (7350)
ELLIS B. MUROV (9839)
JOHN F. WILLIS (19455)
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, LA 70130
Telephone: (504) 581-5141
Attorneys for Succession of
Michael Brady Palmer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon:

Bruce A. North
1100 Fourth Street
Gretna, Louisiana 70053

Clerk of Court
Fifth Circuit Court of Appeals
State of Louisiana
Gretna, Louisiana 70053

Honorable Ronald P. Loumiet
24th Judicial District Court
Parish of Jefferson
Gretna, Louisiana 70053

by hand or by U.S. Mail, postage prepaid and properly addressed, this 18 day of November, 1992.

/s/ Ellis B. Murov
ELLIS B. MUROV

SUPREME COURT

STATE OF LOUISIANA

NO.

O. WILLIAM REEDER, JR.,
Plaintiff/Appellant

VERSUS

THE SUCCESSION OF MICHAEL B. PALMER, LYNN PAUL MARTIN, INDIVIDUALLY and d/b/a LPM ENTERPRISES and BANK OF LaPLACE,
Defendants/Appellees

VERIFICATION

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

ELLIS B. MUROV,

who, after being duly sworn, did depose and state:

Affiant has prepared and read the aforegoing Application for Writ of Certiorari or Review. The factual allegations are accurate and the legal citations, principles and representations are both accurate and sound. Affiant has mailed or delivered the application to the Fifth Circuit Court of Appeals and counsel for Dr. Reeder, Bruce A. North, 1100 Fourth Street, Gretna, LA 70053.

/s/ Ellis B. Murov
ELLIS B. MUROV

Sworn to and Subscribed Before Me
this 18th day of November, 1992.

/s/ Pat S. Hughes
NOTARY PUBLIC